TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 102

JOHN CARLTON DYSART, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 8, 1925

CERTIORARI GRANTED JUNE 8, 1925

(31,155)

(31,155)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 446

JOHN CARLTON DYSART, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Proceedings in the United States circuit court of appeals, fifth circuit	*a*	1
Caption.....(omitted in printing)..	*a*	1
Record from the district court of the United States, western district of Texas	1	1
Caption.....(omitted in printing)..	1	1
Presentment	1	1
Indictment	1	1
Motion to quash indictment	16	10
Order overruling motion to quash	18	11
Charge of court	18	11
Defendant's requested special instructions to jury	22	14
Verdict	26	15
Motion for new trial	27	15
Motion in arrest of judgment	28	16
Order overruling motions for a new trial and in arrest of judgment	29	17
Judgment and sentence	30	17
Petition for writ of error and order allowing same	40	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 22, 1925

	Original	Print
Assignment of errors	42	24
Order fixing amount of cost bond	49	29
Cost bond on writ of error (omitted in printing)	50	29
Writ of error	52	29
Citation and service (omitted in printing)	53	30
Order fixing amount of enlargement bond	55	30
Bill of exceptions	56	31
Caption	56	31
Testimony of A. M. Prescott	57	31
Government Exhibit 1—Circular letter	58	32
Government Exhibit 2—Circular card	59	33
Government Exhibits 3 and 4—O. K'd proof sheets of letter and card	60	34
Testimony of Miss Clara May	65	36
Government Exhibit 7—Facsimile of envelope	89	49
Defendant's motion for verdict	89	50
Argument of counsel	90	50
Defendant's requested special instructions to jury	96	54
Order settling bill of exceptions	106	58
Clerk's certificate	106	58
Argument and submission	108	59
Opinion, Walker, J	109	59
Judgment	114	62
Petition for rehearing	115	62
Order denying petition for rehearing	124	67
Clerk's certificate	125	67
Order granting petition for certiorari	126	68

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Caption (omitted in printing)	a	1
Record from the district court of the United States, western district of Texas	1	1
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Presentment	1	1
Indictment	1	1
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Order overruling motion to quash	18	11
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Defendant's requested special instructions to jury	22	14
Verdict	26	15
Motion for new trial	27	15
Motion in arrest of judgment	28	16
Order overruling motions for a new trial and in arrest of judgment	29	17
Judgment and sentence	30	17
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Argument and submission	108	59
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Petition for rehearing	115	62
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Clerk's certificate	125	67
Order granting petition for certiorari	126	68

[fols. a & b] [Caption omitted]

[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION, OCTOBER TERM, 1923**

PRESENTMENT—Filed Nov. 27, 1923

Now on this the 27th day of November, A. D. 1923, came into open Court the Grand Jury heretofore empaneled, and the roll being called, and a quorum thereof being present, they, through their foreman, T. M. Wilson, presented to the Court the following indictment: No. 5703, The United States vs. John Carlton Dysart, an indictment for violation of Section 211, P. C., which was received by the Court and ordered to be filed and docketed.

[File endorsement omitted.]

INDICTMENT—Filed Nov. 27, 1923

In the name and by the authority of the United States of America, comes our Grand Jury of the United States of America and the Western District of Texas, and the El Paso Division thereof, and being first duly selected, tried, empaneled, sworn, and charged, upon their oaths in open Court do present:

That heretofore, to-wit, on or about the 9th day of November, 1923, within the County of El Paso, State of Texas, Western District of Texas, and the El Paso Division thereof, and within the jurisdiction of this court, one John Carlton Dysart did then and there unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the [fol. 2] United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card were in words and figures substantially as follows, to-wit:

THE ONLY PLACE IN EL PASO WHERE LADIES CAN HAVE HOME COMFORTS. THE BEST OF CARE AND PERFECT SECLUSION DURING PREGNANCY AND CONFINEMENT

THE QUEEN ANN HOME

4021 N. PIEDRAS ST. P. O. BOX 413
EL PASO, TEXAS

A PRIVATE HOME FOR WOMEN DURING PREGNANCY AND CONFINEMENT. With every facility for their care and protection.

This Institution is specially a private retreat for unmarried pregnant women who prefer to be away from home during pregnancy and confinement to preserve individual character or family reputation.

Dr. J. C. Dysart
Resident Physician

CHARGES REASONABLE
Correspondence Strictly Confidential

For Particulars Address
THE QUEEN ANN HOME
4021 N. Piedras St. P. O. Box 413
EL PASO, TEXAS

Phone M 3452 or East 821

[fol. 3] Support the Institution that Protects Your Patient and Preserves the Good Name of the Present and Future Mothers of our Country

(Cut of the Queen Ann Home)

(Same as in Foregoing Card)

The Queen Ann Home

4021 N. Piedras Street, P. O. Box 413, El Paso, Texas

Take Taxi to the Corner of Piedras and Van Buren Streets or Call Phone East 642 and we will call for you

Private Maternity Home for Women During Pregnancy and Confinement, with Every Facility for Their Care and Protection

Dear Doctor: This is not a public hospital, where all kinds and classes are taken, or received, but a private home, where we are prepared to care for a few unfortunate women who do not wish to remain at home during pregnancy and confinement.

Realizing the need of those who, having made a misstep find it necessary to leave home at this critical period.

We have established our home for their protection and care until the time when they may return to their homes and friends free, from the burden of their mistake, to become useful members of society.

We find homes for infants by adoption when desired, or provide board for them at reasonable rates.

It is our aim to place at the disposal of the Medical Profession a respectable private Maternity home, conducted on strictly ethical lines, where they may send patients for advantages they cannot get at home.

[fol. 4] We accept only such persons as are recommended by reputable Physicians, therefore our patients come from the best families and do not run the risk of having to meet or associate with objectionable characters.

Our charges are as low as can be made for the services and accom-odations desired.

Physicians are cordially invited to visit us while in the city.

Address all inquiries to The Queen Ann Home. Dr. J. C. Dysart, Resident Physician. Phone M 3452 or East 821.

said envelope containing said letter and printed card being then and there addressed and directed to "Miss Edna King, c/o Bailey School, El Paso, Texas", he; the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

Second Count

And your Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That heretofore, to-wit: on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid one John Carlton Dysart did then and there un- [fol. 5] lawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of this indictment, which said description of said letter and printed card is herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelope containing said letter and printed card being then and there addressed and directed to "Miss Mamee Young, c/o Neill School, El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

Third Count

And you Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That heretofore, to-wit: on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid, one John Carlton Dysart did then and there unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United [fol. 6] States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of this indictment, which said description of said letter and printed card is herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelope containing said letter and printed card being then and there addressed and directed to "Miss Kathleen Eylar, % Bailey School, El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

Fourth Count

And your Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That heretofore, to-wit on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid on John Carlton Dysart did then and there unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an [fol. 7] envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of this indictment, which said description of said letter and printed card is herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelope containing said letter and printed card being then and there addressed and directed to "Miss Catherine McCarthy, % Vilas School, El Paso, Texas" he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

Fifth Count

And your Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That heretofore, to-wit: on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid, one John Carlton Dysart did then and there unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count [fol. 8] of this indictment, which said description of said letter and printed card is herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelope containing said letter and printed card being then and there addressed and directed to "Miss Martha Esqui-

vel, % Neill School, El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid.

Sixth Count

And your Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That heretofore, to-wit: on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid, one John Carlton Dysart did then and there unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of this indictment, which said description of said letter and printed card is herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelope containing said letter and printed card being then and there addressed and directed to "Miss Bertha Harrell, [fol. 9] % Vilas School, El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

Seventh Count

And your Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That heretofore, to-wit: on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid, one John Carlton Dysart did unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of this indictment, which said description of said letter and printed card is herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelope containing said letter and printed card being then and there ad-

dressed and directed to "Gertrude Fletcher, % Morehead School, El Paso, Texas," he, the said John Carlton Dysart, then and there well [fol. 10] knowing that said envelope contained the letter and printed card aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

Eighth Count

And your Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That heretofore, to-wit: on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid, one John Carlton Dysart did then and there unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of this indictment, which said description of said letter and printed card is herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelope containing said letter and printed card being then and there addressed and directed to "Miss Lillian King, 902 E. Rio Grande Street, El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid.

Contrary to the form of the statute in such cases made and pro- [fol. 11] vided and against the peace and dignity of the United States of America.

Ninth Count

And your Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to-wit: on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid, one John Carlton Dysart did then and there unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of this indictment, which said description of said letter and printed card is

herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelope containing said letter and printed card being then and there addressed and directed to "Miss Grace King, 902 E. Rio Grande Street, El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

[fol. 12] Tenth Count

And your Grand Jurors aforesaid, upon their oaths as aforesaid, do further present:

That heretofore, to-wit: on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid, one John Carlton Dysart did then and there unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivous, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of this indictment, which said description of said letter and printed card is herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelope containing said letter and printed card being then and there addressed and directed to "Miss Jewel Thompson, 606 Myrtile Ave., El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

[fol. 13] Eleventh Count

And your Grand Jurors aforesaid, upon their oths as aforesaid, do further present:

That heretofore, to-wit: on or about the 9th day of November, A. D. 1923, within the County, State, District, Division and Jurisdiction aforesaid, one John Carlton Dysart did then and there unlawfully, wilfully, knowingly and feloniously deposit and cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: letters and printed cards inclosed in an envelope, which said

letters and printed cards were obscene, lewd and lascivious, and which said letters and printed cards are exact duplicates of the letter and printed card fully described in the First Count of this indictment, which said description of said letter and printed card is herein referred to and adopted by your Grand Jurors to the same intent and purposes as though said description were fully set out herein, said envelopes containing said letters and printed cards being then and there addressed and directed to the following named persons, to-wit:

"Miss Lila Thomas, c/o Vilas School, El Paso, Texas," and to
"Mrs. Ethel Stuckey, c/o Vilas School, El Paso, Texas," and to
"Miss Vera Shaw, c/o Vilas School, El Paso, Texas," and to
"Miss Bernice Iverson, c/o Vilas School, El Paso, Texas," and to
"Miss Sallie Blake, c/o Vilas School, El Paso, Texas," and to
[fol. 14] "Mrs. Minnie Condon, c/o Vilas School, El Paso, Texas," and to
"Mrs. Alma Humphreys, c/o Vilas School, El Paso, Texas," and to
"Miss Eva Stapleton, c/o Vilas School, El Paso, Texas," and to
"Mrs. Mamie Patterson, c/o Neill School, El Paso, Texas," and to
"Myra Pearson, c/o Neill School, El Paso, Texas," and to
"Maude Alexander, c/o Neill School, El Paso, Texas," and to
"Mrs. Elvira Eckhart, c/o Neill School, El Paso, Texas," and to
"Miss Mabel Chamberlain, c/o Neill School, El Paso, Texas," and to
"Mrs. Amee Burgie, c/o Neill School, El Paso, Texas," and to
"Miss Frances Stevens, c/o Neill School, El Paso, Texas," and to
"Mrs. Hila Kitchell, c/o Neill School, El Paso, Texas," and to
"Miss Kilford Rice, c/o Bailey School, El Paso, Texas," and to
"Miss Virginia Noyes, c/o Bailey School, El Paso, Texas," and to
"Mrs. Mazie Mantor, c/o Bailey School, El Paso, Texas," and to
"Miss Marie Newton, c/o Bailey School, El Paso, Texas," and to
"Miss Irene Morrison, c/o Bailey School, El Paso, Texas," and to
"Miss Hazel Berry, c/o Bailey School, El Paso, Texas," and to
[fol. 15] "Miss Edith Maloney, c/ Bailey School, El Paso, Texas," and to
"Miss Winifred Shelton, c/ Bailey School, El Paso, Texas," and to
"Miss Elinor Shelton, c/ Bailey School, El Paso, Texas," and to
"Mrs. Lena Heckman, c/ Bailey School, El Paso, Texas," and to
"Mrs. Margaret Roslyn, c/ Bailey School, El Paso, Texas," and to
"Miss Grace Flack, c/ Bailey School, El Paso, Texas," and to
"Mrs. Patricia Robinson, c/ Bailey School, El Paso, Texas," and to
"Miss Sue Lattner, c/ Bailey School, El Paso, Texas," and to
"Miss Kathleen Eylar, c/ Bailey School, El Paso, Texas," and to
"Miss Bertha Watson, c/ Bailey School, El Paso, Texas," and to
"Miss Kathryn More, c/ Bailey School, El Paso, Texas," and to
"C. R. Shiffler, c/ Morehead School, El Paso, Texas," and to
"Mrs. Ruby Price, c/ Morehead School, El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelopes contained the letters and printed cards aforesaid.

Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

T. M. Wilson, Foreman of the Grand Jury.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

No. 5703

THE UNITED STATES OF AMERICA

vs.

JOHN CARLTON DYSART

MOTION TO QUASH INDICTMENT—Filed Jan. 21, 1924

Now comes the defendant, John Carlton Dysart, and moves this Honorable Court to quash the indictment, and to quash each and every count in this indictment therein, contending for the following good and sufficient reasons therein, to-wit:

First. Because said indictment is wholly insufficient in law, because the same does not in any count therein charge this defendant with any offenses, known to the law of the United States of America.

Second. That said indictment and each and every count therein fails to charge a violation of Section 211 of the Penal Code of the United States, in that said indictment does not charge offenses against the law of the United States under said article.

Third. The defendant further moves the Court to quash the indictment because the same fails to allege that the defendant knew [fol. 17] at the time said letters and cards were mailed that the same was lewd and lascivious.

Fourth. Defendant excepts to each and every count of the indictment on the ground that the same is duplicitous and refers to another count in support of said count.

Fifth. Because the last count in said indictment is duplicitous in that it attempts to embody several offenses in one count.

Sixth. That said indictment is vague, indefinite and uncertain and does not apprise the defendant of the charges and allegations against him.

Seventh. Because said indictment upon its face presents as a part of the same letter a card which is alleged to be lewd and lascivious, and that said letter and card upon its face shows that the same is

not lewd and lascivious, and in that respect fails to charge a violation of the laws of the United States, and especially Section 211.

Eighth. That said indictment is repugnant in that the purport clause of the indictment alleges that the lewd and lascivious matter was a letter, and the tenor clause of the indictment shows that the purported instrument is not a letter but a circular.

Wherefore, this defendant prays this Honorable Court to hear and determine said motion and he prays for all special and general relief thereunder as in duty bound and will ever pray.

G. C. Morris, Jno. F. Weeks, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO QUASH—Filed Jan. 21, 1924

Monday, January 21, 1924.

Be it remembered that on this 21st day of January, A. D., 1924, there came on regularly to be heard before the court the defendant's demurrers to, and his motion to quash the indictment in this cause, and the same having been heard, together with the argument of counsel thereon, the court, being fully advised in the premises, is of opinion that said demurrers and motion should be in all things overruled and refused, and it is accordingly so ordered; to which action of the court the defendant, John Carlton Dysart, then and there in open court excepted.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

CHARGE OF COURT—Filed Jan. 22, 1924

GENTLEMEN OF THE JURY: The defendant John Carlton Dysart is upon trial before you upon a charge of having unlawfully and [fol. 19] knowingly deposited and caused to be deposited in the Post Office of the United States at El Paso in El Paso County, Texas, for mailing and conveyance through the United States mails and for delivery from said Post Office of certain letters and printed cards enclosed in envelopes, and alleged to have been obscene, lewd and

lascivious. The words and figures of said letters and printed cards are alleged to have been alike and the words and figures thereof are set out in full in the first count of the indictment, which you may carry with you when you retire to consider your verdict, and to which you may refer for information.

The indictment contains eleven (11) counts or separate charges, all similar in their allegations except that each count charges that the envelope containing said letter and printed card was addressed and directed to a different person from the addressees mentioned in the other counts.

The offenses charged are alleged to have been committed in El Paso County, Texas, on or about the 9th day of November, 1923.

The defendant has entered a plea of not guilty to each and every count.

The statute declares that every obscene, lewd or lascivious letter, writing, print, or other publication of an indecent character is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier, and whoever shall knowingly deposit or cause to be deposited for mailing or delivery any such non-mailable matter shall be punished.

The jury has listened to the reading of the indictment, you have heard the evidence, and the argument, both for the Government and [fol. 20] for the defendant, and now after you have received the charge of the Court instructing you as to the law of the case, you will take up the various counts of the indictment and determine and say by your verdict whether the defendant is guilty or not guilty as in each count charged.

In passing upon each count of the indictment, if you find from the evidence beyond a reasonable doubt that the defendant did knowingly deposit, or cause to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States mails and for delivery from said Post Office, the letter and printed card mentioned therein, and if you further find from the evidence that said letter and printed card were obscene, lewd, and lascivious, you will find the defendant guilty as charged in such count and so specify in your verdict.

Whether the letter and printed card were obscene, lewd and lascivious is for the exclusive determination of the jury, and in determining that question you will consider them as a whole. If they were of themselves of such a nature and character as would tend to corrupt the morals of those to whom they were addressed or into whose hands they might fall, and whose minds might be open to such influences, by arousing or implanting in such minds lewd and lascivious thoughts or desires they would be obscene and within the prohibition of the statute.

When the necessary inference from the language used is obscene it is immaterial that the words used were not themselves obscene.

The letter and printed card must be judged by the jury only by the language used therein. What the intent, motive and purpose of the defendant might have been is immaterial. That his motive may [fol. 21] have been benevolent would be no defense if the letter and

printed card were in fact obscene, lewd and lascivious in the sense that I have already defined to you.

Unless you find the letter and printed card obscene, lewd and lascivious, that is to say unless you find that they were of such a nature and character as tended to corrupt the morals of those to whom they were addressed or into whose hands they might fall and whose minds might be open to such influences, by arousing or implanting in such minds lewd and lascivious thoughts or desires, you will find the defendant not guilty, however objectionable you may find the language of said letter and printed card may have been otherwise.

To warrant the conviction of the defendant in this case you must believe beyond a reasonable doubt,

First, that the defendant knowingly deposited or caused to be deposited the letter and printed card mentioned in the indictment, in the Post Office of the United States, addressed to the women named in the indictment. If defendant did not direct said letters and cards to be addressed to said women, but only to doctors, he would be entitled to acquittal; and

Second, that said letter and printed card were obscene, lewd and lascivious in the sense which I have already defined to you. If they were not so obscene, lewd and lascivious, defendant should be acquitted, even though you should consider said letter and card, and the sending thereof through the mails, improper, reprehensible, unjustifiable, and offensive from every other standpoint.

The defendant is presumed to be innocent until his guilt is estab- [fol. 22] lished by legal and competent evidence beyond a reasonable doubt, and if you have a reasonable doubt of his guilt you should acquit him. By reasonable doubt, gentlemen, I do not mean a fanciful conjecture such as an imaginative person might conjure up, but a doubt which reasonably arises from the evidence in the case, or the want of evidence; such a doubt as a reasonable, prudent person would act upon or decline to act upon in affairs of the highest concern to himself.

The jury are the exclusive judges of the credibility of the witnesses, of the weight to be given to their testimony, and of the facts proved.

If you find the defendant guilty you will specify in your verdict the counts you find him guilty on. If you find him not guilty you will so say by your verdict.

If you find the defendant guilty it will not be your duty to affix the punishment which the law provides. That duty is confided by law exclusively to the Court.

W. R. Smith, United States District Judge.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Defendant's Requested Special Instructions to Jury—Filed Jan. 22, 1924

Gentlemen of the Jury: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this [fol. 23] case, that the evidence in this case does not establish that the letter and card alleged in the indictment, upon their face, or either of them, is obscene, lewd and lascivious and it will be your duty to return a verdict of not guilty.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

Defendant's Special Instruction No. 2

Gentlemen of the Jury: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that the Attorney for the Government in his opening argument stated that the test for you to follow in determining whether or not the letter and card offered in evidence was obscene, lewd and lascivious was to determine what indignities or feelings the persons had in mind when he or she received and read the letter and card; you are instructed that that is not the test in law to determine whether or not said letter and card were obscene, lewd and lascivious, [fol. 24] but the true test, in law, if for you to determine whether the card and letter are non-mailable under this statute as obscene, lewd and lascivious is whether their language has a tendency to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands they may fall, by rousing or implanting in such minds obscene, lewd or lascivious thoughts or desires, and unless you believe beyond a reasonable doubt that said letter and card, tested by the above and foregoing instruction, are obscene, lewd and lascivious, then your verdict should be for the defendant and you will acquit him.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

Defendant's Special Instruction No. 7

Gentlemen of the Jury: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this [fol. 25] case, that "obscene" is defined, in law, to be impure, unclean, indecent, foul, filthy or disgusting.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

Defendant's Special Instruction No. 8

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that the legal definition of "Lewdness and Lasciviousness" is that form of immorality which has relation to sexual impurity.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

[fol. 26] Defendant's Special Instruction No. 9

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that the legal definition of "Lewd" is meant a tendency to excite lustful thoughts.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

VERDICT—Filed Jan. 22, 1924

Verdict of the Jury in the Case of The United States vs. John Carlton Dysart. No. 5703, Cr.

[fol. 27] We, the jury, find the defendant, John Carlton Dysart, guilty on all counts as charged.

S. A. Zumwalt, Foreman.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR NEW TRIAL—Filed Jan. 26, 1924

To the Honorable Judge of said Court:

Comes now the defendant, John Carlton Dysart, by his attorney, John F. Weeks, and moves the Court to set aside the verdict rendered herein and to grant a new trial, and for reasons therefor shows to the court the following:

1. The Court erred in overruling defendant's demurrer to the indictment and each count thereof.

2. The Court erred in overruling defendant's motion to quash the indictment and each count thereof.

3. The verdict is contrary to the law of the case.

4. The verdict is not supported by any evidence in the case.

5. The verdict is against the overwhelming preponderance of the evidence in the case.

[fol. 28] 6. The evidence was not sufficient to warrant the conclusion beyond a reasonable doubt, that the defendant was guilty of any of the offenses charged by any of the counts in the indictment.

7. The Court erred in refusing to direct a verdict of "not guilty" at the close of the Government's evidence.

John F. Weeks, Attorney for Defendant.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Motion in Arrest of Judgment—Filed Jan. 26, 1924

To the Honorable Judge of said Court:

And now, after verdict against defendant, John Carlton Dysart, and before sentence, comes the said defendant in his own proper person and by John F. Weeks, his attorney, and moves the court here to arrest judgment herein and not pronounce the same, for the following reasons, to-wit:

1. That the alleged letter and card, copied in the first count of the indictment, and upon which each count of said indictment is predicated, is not in its contents or meaning, directly or indirectly, obscene, [fol. 29] lewd, or lascivious and is not non-mailable matter, as charged in the various counts of said indictment.

2. Because no one of the counts of said indictment alleges an offense against the laws of the United States.

3. Because there was not sufficient evidence to warrant a verdict against the defendant.

John C. Dysart, defendant, by Jno. F. Weeks, Attorney for Defendant.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Order Overruling Motions for a New Trial and Arrest of Judgment—Filed Jan. 25, 1924

Saturday, January 25, 1924.

Be it remembered, that on this day there was presented and came on to be heard before the court, jointly, the defendant's motions for a new trial and in arrest of judgement, and each of them having been heard, together with the argument of counsel thereon and duly considered, the court is of opinion that each of said motions should be overruled and refused, and it is accordingly so ordered, to which ruling and order of the court the defendant' then and there, in open court, duly excepted.

[fol. 30] [File endorsement omitted.]

In United States District Court

[Title omitted]

Judgment and Sentence—Filed Jan. 26, 1924

Saturday, January 26, 1924.

On January 21, 1924, this cause coming on to be heard, came the United States by their District Attorney, and came also the defendant, John Carlton Dysart, in his own proper person and by counsel, and both parties announced ready for trial, and the defendant in open court pleaded not guilty to the charges contained in the indictment herein. Thereupon, a jury, towit: S. A. Zumwalt, and eleven others, was duly selected, empanelled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and on January 22, 1924, having been duly charged by the court, retired in charge of the proper officer to consider of their verdict, and afterwards, on the same day were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is now here entered upon the minutes of the court, towit:

"Verdict of the Jury in the Case of The United States vs. John Carlton Dysart, No. 5703, Cr.

[fol. 31] We, the jury, find the defendant, John Carlton Dysart, guilty on all counts as charged.

(Signed) S. A. Zumwalt, Foreman."

It is therefore considered and adjudged by the Court that the defendant, John Carlton Dysart, is guilty, as found by said jury, of the offense of having, on or about the 9th day of November, 1923, within the County of El Paso, State of Texas, Western District of Texas, and the El Paso Division thereof, and within the jurisdiction of this court, unlawfully, wilfully, knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States of El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, towit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card were in words and figures substantially as follows, towit:

"The only place in El Paso where ladies can have home comforts, the best of care and perfect seclusion during pregnancy and confinement".

(Cut of the Queen Ann Home)

The Queen Ann Home,

4021 N. Piedras Street, P. O. Box 413, El Paso, Texas

A Private Home for Women During Pregnancy and Confinement, with Every Facility for Their Care and Protection

This Institution is especially a private retreat for unmarried pregnant women who prefer to be away from home during pregnancy, and confinement to preserve individual character or family [fol. 32] reputation.

For particulars address, The Queen Ann Home, 4021 N. Piedras St. P. O. Box 413, El Paso, Texas.

Dr. J. C. Dysart, Resident Physician.

Charges reasonable. Correspondence strictly confidential. Phone M. 3452 or East 821".

"Support the institution that protects your patient and preserves the good name of the present and future mothers of our country".

(Cut of the Queen Ann Home)

The Queen Ann Home,

4021 N. Piedras Street, P. O. Box 413, El Paso, Texas

Take taxi to the corner of Piedras and Van Buren Streets, or call phone East 642, and we will call for you.

Private Maternity Home for Women During Pregnancy and Confinement, with Every Facility for Their Care, and Protection

DEAR DOCTOR: This is not a public hospital, where all kinds and classes are taken, or received, but a private home, where we are prepared to care for a few unfortunate women who do not wish to remain at home during pregnancy and confinement.

Realizing the need of those who, having made a misstep find it necessary to leave home at this critical period.

We have established our home for their protection and care until the time when they may return to their homes and friends free, from the burden of their mistake, to become useful members of society.

[fol. 33] We find homes for infants by adoption when desired, or provide board for them at reasonable rates.

It is our aim to place at the disposal of the Medical Profession a respectable private maternity home, conducted on strictly ethical lines, where they may send patients for advantages they cannot get at home.

We accept only such persons as are recommended by reputable physicians, therefore, our patients come from the best families and do not run the risk of having to meet or associate with objectionable characters.

Our charges are as low as can be made for the services and accommodations desired.

Physicians are cordially invited to visit us while in the city.

Address all inquires to The Queen Ann Home.

Dr. J. C. Dysart, Resident physican. Phone M. 3452 or East 821.

Said envelope containing said letter and printed card being then and there addressed and directed to "Miss Edna King, c/o Bailey School, El Paso, Texas," he the said John Carlton Dysart then and there well knowing that said envelope contained the letter and printed card aforesaid as charged in the first count of the indictment, and,

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, unlawfully, wilfully, knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, towit: [fol. 34] a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and

which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of the indictment herein; the said envelope containing said letter and printed card being then and there addressed and directed to "Miss Mamee Young, % Nevil School, El Paso, Texas," he the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid, as charged in the second count of the indictment; and,

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, unlawfully, wilfully, knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of the indictment herein; the said envelope containing said letter and printed card being then and there addressed and directed to "Miss Kathleen Eylas, % Bailey School, El Paso, Texas," he, the said John Carlton Dysart then and there knowing that said envelope contained the letter and printed card aforesaid, as charged in the third count of the indictment; and,

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, unlawfully, wilfully, knowingly and feloniously deposited and caused to be deposited in the Post [fol. 35] Office of the United States at El Paso, In El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, towit: a letter and printed card inclosed in an envelope which said letter and printed card were obscene, lewd and lasivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Court of the indictment herein; said envelope containing said letter and printed card being then and there addressed and directed to "Miss Catherine McCarthy % Vilas School, El Paso, Texas," he, the said John Carlton Dysart, then and well knowing that said envelope contained the letter and printed card aforesaid, as charged in the fourth count of the indictment; and,

Of the offense of having, on or about the date, and within the venue and jurisdiction aforesaid, unlawfully, wilfully, knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, towit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Court of the indictment

herein; said envelope containing said letter and printed card being then and there addressed and directed to "Miss Martha Esquivel, % Neil School, El Paso, Texas" he, the said John Carlton Drysart then and there well knowing that said envelope contained the letter and printed card aforesaid, as charged in the fifth count of the indictment; and,

Of the offense of having, on or about the date, and within the [fol. 36] venue and jurisdiction aforesaid, unlawfully, wilfully knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, towit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of the indictment herein; said envelope containing said letter and printed card being then and there addressed and directed to "Miss Bertha Harrell, % Vilas School, El Paso, Texas," he the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid, as charged in the sixth count of the indictment; and,

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid unlawfully, wilfully, knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, towit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of the indictment herein; said envelope containing said letter and printed card being then and there addressed and directed to "Gertrude Fletcher, % Morehead School, El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid; as charged in the [fol. 37] seventh count of the indictment; and,

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, unlawfully, wilfully knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States at El Paso in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of the indictment herein; said envelope containing said letter and printed card being then ard there addressed and directed to "Miss Lillian King, 902 E. Rio Grande Street, El Paso, Texas" he the said John Carlton Dysart,

then and there well knowing that said envelope contained the letter and printed card aforesaid, as charged in the eighth count of the indictment; and,

Of the offense of having on or about the date and within the venue and jurisdiction aforesaid, unlawfully, wilfully knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of the indictment herein; said envelope [fol. 38] containing said letter and printed card being then and there addressed and directed to "Miss Grace King, 902 E. Rio Grande Street, El Paso, Texas" he the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid, as charged in the ninth count of the indictment; and,

Of the offense of having on or about the date and within the venue and jurisdiction aforesaid, unlawfully, wilfully, knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter, to-wit: a letter and printed card inclosed in an envelope, which said letter and printed card were obscene, lewd and lascivious, and which said letter and printed card are exact duplicates of the letter and printed card fully described in the First Count of the indictment herein; said envelope containing said letter and printed card being then and there addressed and directed to "Miss Jewel Thompson, 606 Myrtle Avenue, El Paso, Texas," he, the said John Carlton Dysart, then and there well knowing that said envelope contained the letter and printed card aforesaid, as charged in the tenth count of the indictment; and,

Of the offense of having, on or about the date and within the venue and jurisdiction aforesaid, unlawfully, wilfully, knowingly and feloniously deposited and caused to be deposited in the Post Office of the United States at El Paso, in El Paso County, Texas, for mailing and conveyance through the United States Mails and for delivery from said Post Office certain non-mailable matter towit: letters and printed cards inclosed in an envelope, which said letters and printed cards were obscene, lewd and lascivious, and which said letters and [fol. 39] printed cards are exact duplicates of the letter and printed card fully described in the First Count of the indictment herein; said envelopes containing said letters and printed cards being then and there addressed and directed to "Miss Lila Thomas, c/o Vilas School, El Paso, Texas, and to thirty-four other persons, seven of which were addressed c/o Vilas School, El Paso, Texas, eight, c/o Neill School, El Paso, Texas, seventeen c/o Bailey School, El Paso, Texas, and two c/o the Moorehead School El Paso Texas, he, the said John Carlton Dysart then and there well knowing that said

envelopes contained the letters and printed cards aforesaid, as charged in the eleventh count of the indictment. And sentence was temporarily deferred.

And now on this 26th day of January, A. D., 1924, the said defendant, having been brought into open court for the purpose of receiving sentence, being asked by the court if he had anything to say why sentence of the law should not be pronounced against him and he answered nothing in bar thereof:

It is the order and sentence of the Court that the defendant, John Carlton Dysart, for the said offenses by him committed, pay to the United States of America, a fine in the sum of Two thousand five hundred dollars, and be imprisoned in the United States Penitentiary at Leavenworth, State of Kansas, for the period of five years.

And it is further ordered and adjudged that the Marshal transport the said John Carlton Dysart to the said United States Penitentiary at Leavenworth, State of Kansas, and deliver him, the said John Carlton Dysart, to the warden or keeper of the said penitentiary, and that the said warden or keeper detain the said John Carlton Dysart according to this sentence; and that the Clerk of [fol. 40] this Court immediately certify, under the seal of this Court, and deliver to the Marshal of the District, two copies of this judgment, sentence and order, one of which shall accompany the body of the said John Carlton Dysart, and to be left therewith at the said penitentiary, the said copy to be warrant and authority for the transportation and imprisonment of the said John Carlton Dysart as hereinbefore provided, and the other of said copies to be returned to the Clerk of this Court, with the return of the Marshal endorsed thereon, showing how he has executed the same.

It is further ordered that the said defendant be temporarily committed to the County Jail of El Paso County, Texas, until the Marshal can conveniently obey the directions of this sentence.

Vol. 14, Page 326.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME —Filed Jan. 28, 1924

To the Honorable District Court:

Now comes Doctor John Carlton Dysart, the defendant herein, by his attorney, John F. Weeks, and says that he was convicted, a [fol. 41] verdict of guilty being rendered against him in the above styled and numbered cause, and a judgment was rendered thereon,

on the 26th day of January, 1924, on which date sentence was pronounced against him as appears of record, and that in the said judgment and in the proceedings had prior thereto, upon the trial of this cause, errors were committed to the prejudice of the defendant, all of which will more fully appear from the assignment of errors filed with this petition.

Wherefore, said defendant respectfully prays that a writ of error be allowed in this behalf out of the Honorable United States Circuit Court of Appeals for the Fifth Circuit, for the correction and revision of the errors so complained of, and that a transcript of the record of proceedings and papers in this cause duly authenticated, be sent to the Honorable Circuit Court of Appeals for the Fifth Circuit for the correction and revision of said errors, and that upon the hearing of this cause before the said Circuit Court of Appeals it be reversed, and that such other and further orders, judgments and decrees be made and entered therein as shall be deemed just in the premises.

Respectfully submitted, John Carlton Dysart, Dft. John F. Weeks, Attorney for Defendant.

Allowed this the 28th of January, 1924.

W. R. Smith, Judge of the U. S. District Court.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 28, 1924

The above named defendant, John Carlton Dysart, by his attorneys, in connection with his Petition for Writ of Error herein makes the following Assignments of Error which he alleges occurred on the trial of this cause.

First

The Court erred in overruling and not sustaining this Defendant's motion to quash the indictment and each and every count thereof, because said indictment is wholly insufficient in law, because the same does not in any count therein charge this defendant with any offenses known to the law of the United States of America.

Second

The Court erred in overruling and not sustaining this Defendant's motion to quash the indictment herein and each and every count thereof, because said indictment and each and every

count therein fails to charge a violation of Section 211 of the United States, in that said indictment does not charge offenses against the law of the United States under said article.

Third

The Court erred in overruling and not sustaining this Defendant's motion to quash the indictment herein, and each and [fol. 43] every count thereof, because the same fails to allege that the defendant knew at the time said letters and cards were mailed that the same was lewd and lascivious.

Fourth

The Court erred in overruling and not sustaining this Defendant's motion to quash the indictment herein, and each and every count thereof, because the same is duplicitous and refers to another count in support of said count.

Fifth

The Court erred in overruling and not sustaining this Defendant's motion to quash the indictment herein, and especially the last count therein, because said last count is duplicitous in that it attempts to embody several offenses in one count.

Sixth

The Court erred in overruling and not sustaining this Defendant's motion to quash the indictment herein, and each and every count thereof, because said indictment is vague, indefinite and uncertain and does not apprise the defendant of the charges and allegations against him.

Seventh

The Court erred in overruling and not sustaining this Defendant's motion to quash the indictment herein, and each and every count thereof, because said indictment upon its face presents as a part of the same letter a card which is alleged to be lewd and lascivious, and that said letter and card upon its face shows that the same is not lewd and lascivious, and in that respect fails to charge a violation of the laws of the United States, and especially Section 211.

[fol. 44]

Eighth

The Court erred in overruling and not sustaining this Defendant's motion to quash the indictment herein, and each and every count thereof, because said indictment is repugnant in what the purport clause of the indictment alleges that the lewd and

lascivious matter was a letter, and the tenor clause of the indictment shows that the purported instrument is not a letter but a circular.

Ninth

The Court erred in overruling and not sustaining this Defendant's motion to instruct the jury peremptorily to return a verdict for the defendant, as follows:

"Now comes the defendant and moves the Court to instruct the jury peremptorily to return a verdict for the defendant upon the ground that the Government has failed to prove that the defendant placed in the United States mail, or authorized the placing therein, of any of the circulars or literature described in the indictment, to the persons named in the indictment, and on the contrary the Government has affirmatively proved by putting in evidence the conversation had by the witness Snider with the defendant that the defendant did not mail or authorize the mailing of the circular letters described in the indictment and that the same was mailed, if at all, by mistake and without his knowledge or consent.

"The defendant further moves the Court to instruct a verdict of not guilty for the further reason that there is no explanation by the evidence and from the evidence as to the meaning of any word or words in said letter or card other than the plain language of the letter and card, and that said letter and card when reasonably construed show upon their face that the same are not lewd, lascivious [fol. 45] or obscene, there being no innuendoes in the indictment and no proof offered that they have any other meaning except the common acceptation of the words used by the card and circular, and that said circular and card are not upon their face, or either of them, lewd, lascivious or obscene, and there is no issue of fact to be submitted to the jury.

"Wherefore the defendant moves the Court to instruct a verdict of not guilty."

Tenth

The Court erred in refusing to stop the Assistant District Attorney in his closing argument, and instruct the jury not to consider the same, for the reason that said argument was outside of the record and was calculated to inflame the minds of the jury to the great prejudice of the defendant.

Eleventh

The Court erred in overruling and not sustaining this Defendant's objections to the Court's charge to the jury herein, upon the ground that the matter charged in the indictment is so clearly not lewd, lascivious or obscene that no issue as to its meaning should be submitted to the jury, but the Court should charge the jury peremptorily.

Twelfth

The Court erred in refusing and not granting this Defendant's Special Charge No. 1, as follows:

"You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that the evidence in this case does not establish that the letter and card alleged in the [fol. 46] indictment, upon their face, or either of them, is obscene, lewd and lascivious and it will be your duty to render a verdict of not guilty."

Twelve A

The Court erred in refusing and not granting this Defendant's Special Charge No. 2 as follows:

"You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that the Attorney for the Government in his opening argument stated that the test for you to follow in determining whether or not the letter and card offered in evidence was obscene, lewd and lascivious was to determine what indignities or feelings the person had in mind when he or she received and read the letter and card; you are instructed that that is not the test in law to determine whether or not said letter and card were obscene, lewd and lascivious, but the true test, in law, is for you to determine whether the card and letter are nonmailable under this statute as obscene, lewd and lascivious is whether their language has a tendency to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands they may fall, by rousing or implanting in such minds obscene, lewd or lascivious thoughts or desires, and unless you believe beyond a reasonable doubt that said letter and card, tested by the above and foregoing instruction, are obscene, lewd and lascivious, then your verdict should be for the defendant and you will acquit him."

Thirteenth

The Court erred in refusing and not granting this Defendant's Special Charge No. 7, as follows:

"You are instructed at the request of the Defendant, and the [fol. 47] same is given you as a part of the law in this case, that 'obscene' is defined, in law, to be impure, unclean, indecent, foul, filthy or disgusting."

Fourteenth

The Court erred in refusing and not granting this Defendant's Special Charge No. 8, as follows:

"You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that the legal definition of 'Lewdness and Lasciviousness' is that form of immorality which has relation to sexual impurity."

Fifteenth

The Court erred in refusing and not granting this Defendant's Special Charge No. 9, as follows:

"You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that the legal definition of 'Lewd' is meant a tendency to excite lustful thoughts."

Sixteenth

Because the Court erred in not granting and in overruling the Defendant's Motion for a New Trial herein, as follows:

"Comes now the defendant, John Carlton Dysart, by his attorney, John F. Weeks, and moves the Court to set aside the verdict rendered herein and to grant a new trial, and for reasons therefor shows to the Court the following:

"1. The Court erred in overruling defendant's demurrer to the indictment and each count thereof.

[fol. 48] "2. The Court erred in overruling defendant's motion to quash the indictment and each count thereof.

"3. The verdict is contrary to the law of the case.

"4. The verdict is not supported by any evidence in the case.

"5. The verdict is against the overwhelming preponderance of the evidence in the case.

"6. The evidence was not sufficient to warrant the conclusion beyond a reasonable doubt, that the defendant was guilty of any of the offenses charged by any of the counts in the indictment.

"7. The Court erred in refusing to direct a verdict of 'not guilty' at the close of the Government's evidence."

Seventeenth

The Court erred in not granting and in overruling the Defendant's motion in arrest of judgment herein, because the alleged letter and card, copied in the first count of the indictment, and upon which each count of said indictment is predicated, is not in its contents or meaning, directly or indirectly, obscene, lewd, or lascivious and is not non-mailable matter as charged in the various counts of said indictment.

Eighteenth

The Court erred in not granting and in overruling the Defendant's motion in arrest of judgment herein, because no one of the counts of said indictment alleges an offense against the laws of the United States.

Nineteenth

The Court erred in not granting and in overruling the Defend- [fols. 49 & 50] ant's motion in arrest of judgment herein, because

there was not sufficient evidence to warrant a verdict against the defendant.

Wherefore, it is respectfully prayed that this cause be reversed and remanded for further proceedings in accordance with the law.

John F. Weeks, Attorney for Defendant, John Carlton Dysart.

Filed January 28, 1924, (El Paso Division). D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas; by J. N. Phillips, Deputy Clerk.

In United States District Court

[Title omitted]

Order Fixing Amount of Cost Bond—Filed Jan. 28, 1924

It is ordered by the court that the cost bond in this cause to be executed by and on behalf of the defendant, Dr. John Carlton Dysart, be and the same hereby is, fixed at the sum of Three Hundred Dollars ($300.00).

W. R. Smith, U. S. District Judge.

[File endorsement omitted.]

[fol. 51] Bond on Writ of Error for $300.00—Approved and filed Jan. 29, 1924; omitted in printing

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[fol. 52] In United States District Court

Writ of Error—Filed Jan. 28, 1924

The President of the United States to the Honorable Judge of the District Court of the United States for the Western District of Texas, El Paso Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States, before you, or some of you, between Dr. John Carlton Dysart, plaintiff in error, and the United States of America, defendant in error, manifest error hath happened, to the great damage of the said Dr. John Carlton Dysart, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

[fols. 53 & 54] Witness the Honorable William Howard Taft, Chief Justice of the United States, the 28th of January, in the year of our Lord one thousand nine hundred and twenty-four.

D. H. Hart, Clerk of the United States District Court for the Western District of Texas, by J. N. Phillips, Deputy Clerk. (Seal.)

Issued January 28, 1924.
Allowed this, the 28th day of January, A. D. 1924.
W. R. Smith, United States District Judge.

[File endorsement omitted.]

Citation—In usual form showing service on John D. Hartman: filed Jan. 28, 1924; omitted in printing

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[fol. 55] In United States District Court

[Title omitted]

Order Fixing Amount of Enlargement Bond—Filed Jan. 28, 1924

It appearing to the court that a writ of error has been sued out in this case by the defendant, Dr. John Carlton Dysart, returnable to the United States Circuit Court of Appeals for the Fifth Circuit, from the judgment made and entered by this court on the 26th day of January, A. D. 1924.

And it appearing that the United States Attorney has no objection, it is therefore ordered and decreed that the defendant, Dr. John Carlton Dysart, be so admitted to bail in the sum of Ten Thousand Dollars, ($10,000.00), conditions as required by law and the rules of court; and that upon the filing of said bond, stay of execution is hereby granted pending the determination of this said writ of error. Said bonds may be approved by the United States Commissioner.

Done at El Paso, Texas, this the 28th day of January, A. D. 1924.
W. R. Smith, U. S. Dist. Judge.

[File endorsement omitted.]

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions

CAPTION

Hon. William Robert Smith, Judge, Presiding:

Be it remembered, that on this the 21st day of January, A. D. 1924, at 9.30 o'clock A. M. at the regular October Term A. D. 1923, of the United States District Court for the Western District of Texas, El Paso Division, the above entitled and numbered cause was called for trial. Honorable William Robert Smith, Judge of said Court, presiding, Norman J. Morrisson, Esq., Assistant District Attorney, and H. R. Gamble, Esq., Special Assistant to the District Attorney, then and there appeared as Counsel for the Government; J. F. Weeks, Esq., and G. C. Morris, Esq., of El Paso, Texas, appeared as Counsel for the Defendant; said Defendant was then and there present in person; each of the parties announced ready for trial, and the Defendant thereupon presented the following motion to Quash the Indictment, as follows, to-wit:

(See page 16.)

Which said motion to Quash the Indictment the Court overruled, to which action of the Court the Defendant, by his counsel, then and there in open court excepted.

Thereupon a jury was examined, selected, empanelled, and sworn, and the following proceedings were had:

[fol. 57] Counsel for the Government read to the jury the indictment herein as follows, to-wit:

(See page 1.)

to which the defendant pleaded not guilty.

It was admitted in open court by the Defendant that each of the persons named in the indictment received a copy of the matter set out in the indictment, through the mails, and post marked El Paso, Texas, dated November 9, 1923.

A. M. PRESCOTT, a witness for the Government, being first duly sworn, testified as follows:

Direct examination:

My name is A. M. Prescott. I am in the printing business. The name of my printing shop is Arteraft Printing Company, and is located out here on Kansas Street, just north of the City Hall.

I was in the printing business in March, 1923, and continuously from then up to date.

I know Dr. J. C. Dysart. I have had occasion to do some business for him.

(Counsel for the Government handed the witness a letter head with some literature on it, and a card design.) I printed that literature for Dr. Dysart.

(Counsel handed witness an original manuscript:) I have seen that original manuscript: I got it from Dr. Dysart. These printed sheets are O. K.'d by Dr. Dysart, both the card and the letter. I saw Dr. Dysart O. K. that. It is my custom to have the proofs O. K.'d before I make my final run.

I printed 1,000 each of the letters and printed cards of the class [fol. 58] that I hold in my hand. I think I turned out this printing order along about February 11th, 1923. I delivered the printed product to Dr. Dysart.

(The Government offered in evidence the original manuscript of the letter and card, same being marked Government Exhibits Nos. 1 and 2, respectively, and are in words and figures as follows, to-wit:

GOVT. EX. 1—Filed Jan. 21, 1924

(In ink:) 1,000—Regular letter size, same quality of paper as this.

Support the Institution that protects your Patient and preserves the good name of the present and future mothers of our Country.

(Cut of the Queen Ann Home)

The Queen Ann Home

Take taxi to the corner of Piedras and Van Buren Street, or call phone East 642 and we will call for you.

A Private Maternity Home for Women During Pregnancy and Confinement, with Every Facility for Their Care and Protection

DEAR DOCTOR: This is not a public hospital, where all kinds and classes are taken, or received, but a private home, where we are prepared to care for a few unfortunate women who do not wish to remain at home during pregnancy and confinement.

Realizing the needs of those who, having made a misstep, find it necessary to leave home at this critical period, we have established our home for their protection and care until the time when they may return to their homes and friends, free from the burden of their mistake, to become useful members of society.

[fol. 59] We find homes for infants by adoption when desired, or provide board for them at reasonable rates.

It is our aim to place at the disposal of the Medical Profession a respectable private Maternity home, conducted on strictly ethical lines, where they may send patients for advantages they cannot get at home.

We accept only such persons as are recommended by reputable Physicians, therefore our patients come from the best families and do not run the risk of having to meet or associate with objectionable characters.

Our charges are as low as can be made for the services and accommodations desired.

Physicians are cordially invited to visit us while in the City.

Address all inquiries to The Queen Ann Home, 4021 North Piedras St., El Paso, Texas. P. O. Box 413.

[File endorsement omitted.]

Govt. Ex. 2—Filed Jan. 21, 1921

(In ink:) 1,000 post card size on white card.

The only place in El Paso where ladies can have home conforts. The best of care and perfect seclusion during pregnancy and confinement.

[fol. 60] (Cut of Building)

(In ink:)
The [Dysart Sanitarium Company]* Queen Ann Home
[4000]* N. Piedras Street, El Paso Texas.
(In ink:) 4021 (In ink:) P. O. Box 413.

Home
A Private [Sanitarium]* for Women During Pregnancy and Confinement, with Every Facility for Their Care and Protection

This institution is especially a private retreat for unmarried pregnant women who prefer to be away from home during pregnancy and confinement to preserve individual character or family reputation.

Charges reasonable. Correspondence strictly confidential. For particulars address

(In ink:) the Queen Ann Home,
[Mrs. Kate Brown,]*
[4000]* N. Piedras Street, P. O. Box 413.
4021
El Paso, Texas."

[File endorsement omitted.]

(The Government offered in evidence the O. K.'d print sheet for the printed card and the letter, same being in words and figures as follows, and being marked Government Exhibits Nos. 3 and 4:)

[*Erased in copy.]

GOVT. EX. 3—Filed Jan. 21, 1924

"The only place in El Paso where ladies can have home comforts. [fol. 61] The best of care and perfect seclusion during pregnancy and confinement.

(Cut Showing "The Queen Ann Home"

The Queen Ann Home,

4021 N. Piedras Street, P. O. Box 413, El Paso, Texas

A Private Home for Women During Pregnancy and Confinement with Every Facility for Their Care and Protection

This institution is especially a private retreat for unmarried pregnant women who prefer to be away from home during pregnancy and confinement to preserve individual character or family reputation.

For particulars address The Queen Ann Home, 4021 N. Piedras St., P. O. Box 413, El Paso, Texas.

Charges reasonable. Correspondence strictly confidential.

(In pencil:) O. K. Dr. Dysart.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

GOVT. EX. 4—Filed Jan. 21, 1924

A Private Maternity Home for Women During Pregnancy and Confinement, with Every Facility for Their Care and Protection

DEAR DOCTOR: This is not a public hospital, where all kinds and classes are taken, or received, but a private home, where we are prepaired to care for a few unfortunate women, who do not wish to remain at home during pregnancy and confinement.

Realizing the need of those who, having made a misstep find it necessary to leave home at this critical period.

We have established our home for their protection and care until the time when they may return to their homes and friends free, from the burden of their mistake, to become useful members of society.

We find homes for infants by adoption when desired, or provide board for them at reasonable rates.

It is our aim to place at the disposal of the Medidal Profession a respectable private Maternity Home, conducted on strictly ethical lines, Where they may send patients for advantages they cannot get at home.

We accept only such persons as are recommended by reputable Physicians, therefore our patients come from the best families and do not run the risk of having to meet or associate with objectionable characters.

Our charges are as low as can be made for the services and accommodations desired.

Physicians are cordially invited to visit us while in the City.

[fol. 63] Address all inquiries to The Queen Ann Home.

O. K. Dr. Dysart.

[File endorsement omitted.]

(The witness, continuing:) I made delivery of this order to Dr. Dysart either in February or the first of March, 1923.

I am appearing here in court today under a subpœna requiring me to produce these documents. (Counsel handed witness a paper); That is the subpœna that was served upon me, which shows it was issued January 10th, 1924. About two or three weeks before January 10th, 1924, I had a conversation with Dr. Dysart relative to the manuscript and the O. Kd. printed proof which I have produced in court here today. He just asked me if I would give him that copy, and I told him yes. I do not know and he did not say what he wanted or desired with this copy.

Cross-examination:

(Counsel handed witness a paper):

I don't know whether I did that printing at my office, this particular one. It is similar to the one I printed.

Counsel for defendant: We have not compared it, Mr. Morrisson, but I presume it is the same as this manuscript.

Counsel for Government: I think so.

That is what we call a circular letter, it is really a printed circular; call it whatever you please it is a circular letter. I printed 1,000 of [fol. 64] those circulars. (The witness was askd to compare the letter or circular which counsel handed him with the manuscript or printed copy which had been identified by the witness): As far as I can see it looks just alike, and it is my best judgment that I printed that.

(The stenographer, at request of counsel for defendant's counsel, thereupon marked the paper "For identification.")

There is a portion of this that wasn't on there at the time I delivered them, that on the left hand corner; that wasn't there at the time I delivered it; that is not a part of the original, according to the manuscript.

Counsel for Government: What is that, the name?

Counsel for defendant: Yes, sir.

Redirect examination:

I call this a circular letter.

Recross-examination:

Q. Mr. Prescott, in order to get it in the record, what is the difference between this circular letter, if you know, and a letter?

Counsel for Government: I object to that, your Honor; it calls for a conclusion of law. The statute provides it is an offense to send a letter and certain other classes of literature.

The Court: I think that is immaterial in this case. This document is set out in full, no matter what the indictment calls it.

Counsel for defendant: But for the purpose of the bill, your [fol. 65] Honor, we expect to show by the witness that this is not a letter, it is a circular. We except.

(Witness excused.)

Miss CLARA MAY, a witness for the Government, being first duly sworn, testified as follows:

Direct examination:

My name is Clara May, I live here in El Paso. I am nineteen years old.

I know and knew during Novem' er of 1923, a Miss Lula Giles. I worked for her. Her office was at 220 Trust Building here in the City of El Paso. I was working for her part of the month of November, 1923. I am a stenographer. Miss Giles is a public stenographer, she runs a public stenographers bureau.

I know Dr. John Carlton Dysart. I have known him more than a year. I have worked for him. I worked for Miss Giles some, I worked for her when I didn't have anything else to do, then I worked for Dr. Dysart, and then I worked for Miss Giles again.

(Counsel handed witness Government Exhibits Nos. 3 and 4):

I have seen a letter and a printed card similar to those. I saw them in Miss Giles' office, in 220 Trust Building. I don't know how I happened to see them,—she was working on them, and everything that came in I looked at it. If I remember right there were about 500 of those printed letters and printed cards in Miss Giles' office. Those letters and cards were mailed out in Miss Giles' office.

Q. I hand you a letter marked for identification by the stenographer at Judge Weeks' request, and ask you with particular reference to what appears to be typewriting in the lower left hand corner [fol. 66] of that letter,—do you know anything about how that was put on there?

A. It was put on with a multigraph machine in Miss Giles' office and Miss Giles put it on there.

Q. Now, I hand you a finished product in this card literature, which is similar to the one you have on a light sheet of paper there,—I will ask you with reference to the typewriting on that?

A. That was done also with the multigraph machine, and done by Miss Giles in her office.

I did not see this literature brought into Miss Giles' office,—it was there when I saw it.

I have seen Dr. Dysart in Miss Giles' office in connection with these letters; he came in to O. K. the proof she was putting on these letters, on the letter and the card. The proof that I have reference to that he O. K'd. was the multigraph work which stated the name, resident physician, and the phone numbers. That seemed satisfactory to him, it was all right. I think Dr. Dysart O. K'd. a proof in Miss Giles' office, but if he did he took it with him, because when the trial came up she looked for it and couldn't find it; then she said the Doctor took it back with him, the proof he O. K'd.

After this proof was O K'd. I saw Dr. Dysart in his office. I don't know the name of the building Dr. Dysart's office is in, but it is on the corner of San Antonio Street and Stanton Street, up above that cigar store; I don't know the name of the building. It is across the street, north of the Trust Building, upstairs above the United Cigar Stores. The occasion of my going over to his office was that I had a sore on my hand and Miss Giles told me to go over there and have him treat it. Miss Giles told me while I was over there to kill [fol. 67] two birds with one stone, and to ask Dr. Dysart if she should mail these letters, and he said yes, there wasn't any use bringing them over there when she could mail them. He said for her to mail them, there wasn't any use for her to bring them over,—he said for Miss Giles to mail them, and he asked me about if she ran out of stamps, or how many more stamps she needed, and I told him I didn't know, and he said to have Miss Giles call him, and she did call him. I did not hear her call him, I went on with my work, I had something else to do.

I did not see Miss Giles mail these letters out. I think Miss Giles got all of those letters addressed ready to go out about November 9th. I think she completed the letters along towards the close of the day on November 9th.

I think Miss Giles is still in her office now.

Q. Do you know whether there is any relationship existing between her and Dr. Dysart now, more than there was at that time?

Counsel for defendant: We object to that as irrelevant and immaterial to any issue in this case.

The Court: I will overrule the objection.

Counsel for defendant: We except.

Q. Do you know whether there is any relationship between Dr. Dysart and Miss Giles now which did not exist at the time these letters were sent out?

A. Well, I don't know, I couldn't say for sure.

Q. Did you ever have occasion to make a trip to Las Cruces with Dr. Dysart and Miss Giles?

A. Yes.

Q. What happened up there?

[fol. 68] A. They were married, Dr. Dysart married Miss Giles.

That was after these letters were mailed out—it was December 5th, they were married Wednesday, December 5th.

Cross-examination:

This multigraph work on here, or similar multigraph work was done in Miss Giles' office; it looks like the same, it is similar multigraph work. I know that is multigraph work. With reference to whether I know of my own knowledge this work was done in Miss Giles' office, or whether it was done in some printing company, I will say it is the same color as that done in Miss Giles' office, and I know she done some work like this, that is what I know.

I did not address any envelopes for Dr. Dysart in Miss Giles' office. I don't know how many envelopes Miss Giles addressed for Dr. Dysart. I did some work in Miss Giles' office for Dr. Dysart; I made a doctors' mailing list for him in Miss Giles' office, on Miss Giles' machine. (Counsel handed witness a document): I have reference to that paper; I put that together, this is a doctor's mailing list of the United States.

Counsel for the Government: We object to that as immaterial, I don't see the materiality of that at this time, going into other mailing lists; there is no time fixed as to when she made that, no showing it relates at all to the sending out of these letters.

The Court: What is the materiality?

Counsel for defendant: She says it was made out at Miss Giles' office about the time these letters were sent out.

Counsel for Government: I take issue with counsel.

[fol. 69] Counsel for defendant: I will ask her.

Q. Was it near the time those letters were sent out that you made that list?

A. Well, it was during his other trial.

Q. I mean did you make that list out about the same time these letters were sent out, or before?

A. I did it before, I should say about a month before, whenever his trial came up.

I made that list myself, I pinned it together. I made the list from information that he gave me—he gave me a book to copy from. Dr. Dysart did not furnish me with literature and envelopes to address to the persons named in that list. I did not address any envelopes to persons named in that list. Miss Giles did not address any envelopes to persons named in that list that I know of.

(Counsel handed witness several envelopes.)

Yes, I addressed those in Dr. Dysart's office. I did not get those names from that list. I got those names from a new list, I copied the names on those envelopes (indicating) out of the directories, an Arizona directory and a New Mexico directory. That data from which I addressed these envelopes was not put together and makes this list. I got the names in this list from a physicians' book, and it

is not the same list that I addressed these envelopes from. That is the first time I ever saw that book. I had an Arizona directory and a New Mexico directory to copy the names on these envelopes from. I don't know how many of those letters I addressed, but about 500 or 600.

(The list that the witness was questioned about and that she admitted she made was about 600 doctors residing in Arizona, New Mexico, Texas and Oklahoma.

[fol. 70] I don't know where this list came from that it appears letters were addressed to some young lady school teachers and married teachers from. I don't know anything about that, I didn't have anything to do with it, and I don't know where they came from.

This list here (indicating list of doctors) is the only list I know anything about.

Q. From that list, Miss Clara, did you address envelopes to each and every person on the list?

A. I didn't address an envelope from that list, I did not address one envelope from that list.

Q. From a list—you had a similar list?

A. I didn't have a list; I copied them out of the book.

Q. I say you copied them out on the list, out of the book, and that made up your mailing list?

A. I didn't make a mailing list of it, of a single name.

The Court: What sort of a book was it?

The Witness: It was an Arizona directory and a New Mexico directory. It is exactly like the El Paso directory, fixed up the same, with names and addresses of people, of all the people of Arizona.

Counsel for Government: How long before Miss Giles prepared these Queen Ann Home letters was it you used this Arizona directory and mailed out the letter to doctors?

The Witness: You mean made this list?

Counsel for Government: No.

The Witness: It was while I was working for Dr. Dysart.

[fol. 71] Counsel for Government: About how long before November was that?

The Witness: I think it was in February or March.

Counsel for Government: I object to that and ask that the testimony be restricted to the issues in this case; that seems to be an occasion concerning some mailing out of stuff in February or March.

Counsel for defendant: They have proven that these circulars were printed back last February, I believe, it is proof to show the same circulars. It is to my mind admissible on cross-examination, your Honor.

The Court: I don't understand the question, don't understand the point at all.

Counsel for defendant: Maybe by asking a question I could get the matter clearly before the Court's mind.

(The witness, resuming:) I addressed those 400, 500 or 600 envelopes and put in the envelopes circulars and cards.

The Court: What sort of cards?

Counsel for defendant: The same we have got before the Court, that is alleged to have been mailed; or a similar one, not the same one, but similar in nature.

Q. Did you put in those envelopes that you addressed that circular and card, Miss Clara?

A. I remember that letter head, but I don't know what the body of the letter was.

Q. Dr. Dysart had a great many of them printed, didn't he?

[fol. 72] A. I don't remember; I don't know when he had them printed.

Counsel for Government: I object to that line of questioning, it is immaterial and irrelevant; if Dr. Dysart mailed circulars of this class to doctors in New Mexico and Arizona in February it would have no bearing on the fact that on November 9th he mailed letters to school teachers.

The Court: The bare fact that he was doing that would have no bearing on the facts of this case.

Counsel for defendant: It might have this bearing, that she knows that the list that the other lady she is working for handled, the list he furnished was from directories, and if at his direction she only addressed them to doctors—the evidence we have seems to indicate he did not seem to instruct her to address them to anybody but doctors, it does not yet appear where that list came from, these letters are all addressed "Dear Doctor."

Counsel for Government: He is trying to prove then, as I understand, that he has a custom, and because of that custom he sent out letters to doctors in February is perhaps should be assumed these letters should go to doctors in November, and I don't think he can prove it by custom.

The Court: When were these addressed that you addressed?

The Witness: I think it was in February or March, 1923.

The Court: And when was this other?

Counsel for Government: On November 9th, 1923.

[fol. 73] By counsel for defendant:

Q. Miss Clara, over in Miss Giles' office was there a continuous addressing of envelopes,—in other words, did Miss Giles or any of you in that office use that list to address envelopes?

A. That list was not used.

Counsel for the Government: It is an attempt to prove custom.

The Court: At present I will sustain the objection. If it appears later that testimony is material I will admit it.

Counsel for defendant: I will ask this question then, and ask your Honor to pass on it.

Q. Miss Clara, isn't it a fact that Dr. Dysart told you to address these envelopes and put this circular and card in the envelopes, and address them to doctors only, and gave you a list of doctors to address them to?

Counsel for the Government: I object to that because that relates to the sending in February.

The Court: I will sustain the objection.

Counsel for the defendant: We except.

At the time Dr. Dysart brought me the book from which I made up the list I made up the list and then carried the list to Dr. Dysart. That was when that case came up. I think it was October, about a month before, about a month or two before I made this mailing list before he sent out these last letters. I don't remember it if he gave it back to me and had me carry it back to the public stenographer's office and told me he wanted envelopes addressed to the people named in that list. He didn't give it to me,—I took it over there and gave it to him; he had me to make the list. He did not [fol. 74] tell me he wanted circular letters addressed to the people in that list. Dr. Dysart did not tell me the reason he wanted that list was to mail these circular letters and cards out to doctors; he didn't tell me what he wanted it for, but it being a doctors and physicians book he wanted a mailing list of it.

I saw the circular letters. I don't remember seeing them while he was in the Blumenthal Building. I remember seeing a letter head while he was in the Blumenthal Building, but not the letter. I did not see this circular letter (indicating); I don't remember what was in the body of the letter.

(Counsel handed witness a letter):

How do I know whether I addressed that letter on the typewriter? I addressed an envelope with that same return on it.

Q. Open that and see if that is what you put in it?

A. I don't know what it was, I didn't write the letter. (After looking in envelope:) No, I didn't put that in there.

Q. What did you put in there?

A. Well, if I remember right I addressed those envelopes out of the Arizona and New Mexico directories, sending out literature of the Allied Film Company.

I never saw this circular in the Blumenthal Building at all; I first saw it in Miss Giles' office. I don't know when I first saw it. I think it is the same,—I never paid any attention to the letter,—it was when she was sending these out for him.

Q. Miss Clara, refreshing your memory, don't you know those envelopes, some five or six hundred, you addressed and put circulars [fol. 75] in remained up there in the office as long as you were there, and were there when you left?

A. Well, I know I addressed a lot of them and filled them in, and he didn't have stamps and I just put them back in the box, put them away in the box.

I don't know how many of them there were, but there was about a box and a box holds about 500. I don't remember whether those letters were addressed to a doctor in every instance. Yes, I remem-

ber addressing some to somebody else, that is what we used the Arizona and New Mexico directories for, was getting out the names.

Q. You mean by that, Miss Clara, that you addressed a lot of these (indicating a letter)?

A. No, Miss Giles did that addressing, I didn't address a one of those.

I filled out a lot of letters for him, he was trying to sell stock in the Allied Film Company is what I addressed the envelopes for.

The Court: Did that have anything to do with the matters in this case?

The Witness: No.

The Court: No connection with it?

The Witness: No, it was on this same letterhead; it wasn't Queen Ann Home, it was some other name.

Q. Now, Miss Clara, do you mean to tell us those five or six hundred letters you addressed to doctors was with reference to the allied Film Company?

A. I don't know whether it was addressed to doctors or not.

Q. I will get you to take this bunch of letters and look them over [fol. 76] and see if you have any recollection of the names there on it, if you have any recollection of those names,—just look them over (handing witness a bunch of envelopes)?

A. We didn't have a purple ribbon on our machine either.

Now, I don't think I addressed any of them; if it was just to doctors I don't remember it; I know I taken the directory of all the people.

(Counsel handed witness a circular.)

Yes, I saw that circular in Miss Giles' office, that was the only time. That is addressed to "Dear Doctor" is what it says there. I never did address any of those letters to anybody.

I don't know where this list came from that contained the names of these lady school teachers, only the information I got through Miss Giles. It was a list there in her office. I don't know who the list from which these ladies' names was obtained belonged to.

Q. You have addressed letters from that list before and since, haven't you, that was used in sending out the circulars for the Popular and places of that kind?

A. We sent out a letter from the Warner Drug Company, but it was with Mr. Warner's mailing list.

We did not send out many circulars for the Popular and White House. Miss Giles has lists of all kinds, of people who reside in El Paso, alphabetically arranged; I know she had a school teachers' list, but where she got it I don't know but I saw it in her office. I didn't see it in her office ever since last summer when the schools were organized,—I didn't work for her until November, because I [fol. 77] was out at the farm. When we had some work we had that list of school teachers; I don't know where Miss Giles got it.

I have an independent recollection of those letters in the International Warehouse Company envelopes being mailed out in the office

there; we did a whole lot of work for Mr. Wood or Mr. Brook. Mr. Brook is the man we did the advertising for, did the letters for. I mean to say by that that we sent out for the International Warehouse Company a lot of advertising. I don't know how much we sent out for them, we did work for them several times. I can't say whether we sent out 500 or 1,000 letters. The first amount we sent out was a whole lot, but I don't remember what else. In doing the work for the International Warehouse people they furnished us a list. It was on scratch paper, written in pencil, and we had to make out what the name was. I don't know what they were, I don't remember. We made a mailing list off of his list. Sometimes we would mail out 50 and sometimes 100, and sometimes more,—we did work for him several times, at different times. We mailed out several letters for him at several different times. That is where those envelopes came from. Those envelopes belonged to the International Warehouse Company, but Miss Giles took them as part payment for her work. I did not hear Miss Giles and him talk about it; all I know about it is what she told me. These International Warehouse Company envelopes did not belong to Dr. Dysart; these stamped envelopes did not belong to Dr. Dysart. Miss Giles got $4.00 worth of them from that man Brooks, 200 of them. I don't know what Miss Giles used them for, but this is the envelope. I wasn't there when she used them. I did not address these envelopes. I did not address any of those envelopes to any young lady or married school teachers over there at Miss Giles' office, for Dr. Dysart, I didn't have anything to do with that.

[fol. 78] I remember seeing that mailing list of the teachers at Miss Giles' office. I don't remember using it, or that Miss Giles used it at some time. We used some list, but we got that from Mr. Warner, he has the same list of the teachers.

I never addressed any envelopes to any school teachers for Dr. Dysart.

Q. And do you know whether Miss Giles did, of your own knowledge?

A. I didn't see her.

I never mailed any letters from that office, for Dr. Dysart, to young lady school teachers or married school teachers. I did not see Miss Giles mail them, but I saw her leave the room with them; I did see her take them out of the office. Miss Giles' office is on the second floor. I saw her take the letters out of the office, and I guess she took them downstairs with her, I didn't follow her. I don't know whether she put them in the post office, or whether somebody else put them in the post office. One thing I do know is that I did not do it.

When the controversy came up about mailing these circulars out, they did not claim that I did it up there in the office.

I am not still working for Miss Giles. I have not worked for her since she got married. She has not run her public stenographic office since she got married,—she is this week though. I am not working for her. I am working for Dr. Newman.

I have not talked to any of the Government officers about this

case; I gave them a deposition next day after she was married, that is all I talked to them about. I have talked to Mr. Morrison and [fol. 79] other government officers about it, and I told them what I knew about it. I have talked to you (Judge Weeks) about it, and in each instance I have tried to tell you what I knew about it.

Redirect examination:

I talked to Judge Weeks today at noon down at the Popular.

I said Dr. Dysart was selling stock in the Allied Film Company and I mailed out some letters with that letter head. Instead of that being Queen Ann Home it was Allied Film Company. (Counsel handed witness a paper:) That is what I refer to; that is the same building, which in January of 1923 was the Allied Film Corporation and has since been turned into the Queen Ann Home, and the picture there is the same building.

I don't know whether that building is not completed yet.

(Counsel handed witness a letter.)

I wrote that letter, I wrote this other one too, yes, to General Howze. Those were all at Dr. Dysart's dictation.

I sent out other letters that had the same picture on it, except it had Allied Film Company; it is in all respects the same picture, except the wording there is the Queen Ann Home.

That is all the enterprises that I know of out there, this Allied Film Company.

I wouldn't say the letters I mailed out to people in Arizona and New Mexico were all to doctors. I think those letters (indicating letters shown witness by counsel) are letters that I mailed out to people whose names I got from the Arizona and New Mexico directories; it was letters written on that letterhead.

[fol. 80] I did not put the filler or letter that Judge Weeks showed me just now in the envelopes that I addressed from the Arizona and New Mexico directories.

When I went over and had my hand treated Dr. Dysart told me to tell Miss Giles she could mail the letters out herself, there wasn't any need to bring them over to him. I conveyed that message to Miss Giles.

Recross-examination:

It was these letters that were mailed out that Dr. Dysart told me to tell her to mail.

Q. Was there anything said about what it was?

A. It was this that she mailed, it was in regard to the Queen Ann Home letters that she mailed out.

Q. But there wasn't anything said about who they were to be mailed to, just Queen Ann Home letters, she could mail them herself?

A. No, that is all I know about it.

Redirect examination:

At the time I went over there to get my hand dressed by the Doctor these letters were already addressed by Miss Giles, ready for mailing; they were addressed when I went to work for her, and while I was putting out a job for her she ran these out through the machine and added that resident physician, and his address. The envelopes were addressed first and this multigraph work with Dr. Dysart's name was put on last. When I went over there and asked him about whether she should deliver the letters to him they were all ready for mailing and she wanted to know if she was to take them to him.

[fol. 81] Those International Warehouse Company envelopes I have been asked about were self-stamped, stamped envelopes, and they were at that time.

Recross-examination:

The envelopes were first addressed and then this multigraph work was done later. I don't know how long the envelopes were addressed before the multigraph work was done; they were addressed when I went to work that morning.

Q. They were addressed when you went to work there, wasn't they?

A. Yes.

Q. That is all you know about it, they were addressed when you went to work there?

A. Yes.

(Witness excused.)

R. H. Oliver, a witness for the Government, having been duly sworn, testified as follows:

Direct examination:

My name is R. H. Oliver. I am General Manager of the International Warehouse Company.

(Counsel for the Government handed witness three envelopes on which there was a return card, being stamped envelopes, and the return card being crossed out or X-ed out with a typewriter.)

Those are International Warehouse envelopes.

Q. Did you ever authorize Dr. Dysart or anyone for him to use those envelopes?

A. I did not.

[fol. 82] Counsel for defendant: We wish to object; there is no showing that Dr. Dysart did anything with this; it seems that what-

The Court: I will overrule the objection.

ever use was made was made by Miss Giles.

I first heard of the use of these envelopes in connection with this Queen Ann Maternity Home when one of the young lady school teachers brought it to our office, and I wasn't in the office, and she handed it to Mr. Putnam. I don't remember what date that was. I noticed the post mark on the letter at the time, and I think she brought it to our office possibly five or six days after the date of the post mark.

I made an investigation in the interests of the International Warehouse concerning these envelopes, and in the course of that investigation I interviewed Dr. Dysart. I had the letter with me at the time. I went to Dr. Dysart's office and asked him where he obtained the envelope which carried this letter, etc., and he told me it was all a mistake, that he did not know anything about the envelope, that he had Miss Giles do his work and that she mailed them out.

Q. You say he stated that he had Miss Giles mail them out for him?

A. No, sir.

Counsel for defendant: That is not what he said. We object to that because he has not said that; he may say it, but as far as saying he said something he didn't say we object.

The Court: I overrule the objection.

Counsel for defendant: We except.

[fol. 83] Cross-examination:

Dr. Dysart said he didn't know anything about the envelopes; that he had Miss Giles doing some work for him. That is all I know about it.

(Witness excused.)

Lem Snider, a witness for the Government, being duly sworn, testified as follows:

Direct examination:

My name is Lem Snider. I am a newspaper reporter with the Times, I was with the Times from before November up to date.

I covered the Dysart case for the Times. I recall having a story in the Times on December 7th, last year. The story started off with Dr. Dysart's marriage at Las Cruces, and went down into a statement he had given me the day previous, on the 6th of December, and containing some other information.

Counsel for defendant: We object to all of that.

The Court: I overrule the objection.

And it continued with the statement that Dr. Dysart had given to me the day previous, on Wednesday, the 6th of December,—it was on the 6th and I believe it was on Wednesday,—here in the Federal Building.

Counsel for defendant: We don't think it is competent to put in

evidence something he wrote and put in the paper, and we are excepting to it.

I interviewed Dr. Dysart on the day previous to the printing of that article, on December 6th, and that interview was right down in [fol. 84] the Federal Building, just outside of the Commissioner's office. At that time I asked him for a statement concerning these letters. In his statement to me he said something about whether he had authorized the mailing of the letters. He did not tell me directly at any time what connection he had with the Queen Ann Home, it was brought up, though, in the letters, but I never asked him whether he was connected with it. I understand Dr. Dysart is a practicing physician here in El Paso.

Dr. Dysart made some reference about 200 letters having been mailed out. The reference to the 200 letters was in response to my inquiry concerning the Queen Ann Home letters, it was in regard to the letter there, and he said about 200 of them had been sent out.

Q. Was there any conversation between you and Dr. Dysart about what stenographer had mailed them out?

A. He said Miss Giles had made them out, or they were made in her office rather; he didn't say she made them out personally.

Dr. Dysart said something to me about a mailing list of school teachers in the El Paso Times. He was explaining to me how it happened, how these letters were sent out, and he made reference to the mailing list by saying they had been copied from the Times last fall when the teachers' names were announced and printed. He said it was copied in Miss Giles' office, I understood. I asked him where he got that, where that list came from, and he said that it came out of the Times in the fall just as school opend. That is the list of teachers that were assigned for duty in the fall.

Q. This Miss Giles you refer to and that you talked to him about, isn't she the woman you say this story relates to having married the Doctor?

[fol. 85] A. I understood she is married to him; he always denied it to me, he never has admitted it.

Cross-examination:

The Post came out with a statement that Dr. Dysart and Miss Giles had gotten married, after my story. The Post did not announce it first, the article in the Post is after the article in the Times. I most certainly do read the Post. The Post is not the first paper the story was in; the story did not come out in the Federal Building until 5:00 o'clock at night, and nobody else knew anything about it until I got it. The Herald did not get the story before I got it.

I went to Dr. Dysart and asked him if the rumor that he and Miss Giles were married was true.

Q. Wasn't the language used by you "Is it true, Dr. Dysart, that you and Miss Giles got married last night?"

A. Something to that effect.

He said positively not, most emphatically not, he was most emphatic about saying they did not get married.

Q. He said "last night?"

A. He said that he had not married Miss Giles, he did not specify any definite time. I asked him if he was in Las Cruces.

Q. And when you asked him if he had married the night before he was emphatic and he said no?

A. He said no, yes, sir.

Q. Did he say anything about he had been married two or three days?

A. No, sir, I asked him if he had ever married her,—being trained [fol. 86] as a newspaper reporter I get around those things,—and he said no.

I asked him about the circular letters being sent out in the conversation preceding that conversation about his marriage about an hour. I talked to him first about an hour before, and I heard this rumor and went downstairs again. The statement about mailing the circular letters was made outside of the Commissioner's office.

Q. Isn't it a fact that Dr. Dysart told you that those letters were mailed out from a mailing list clipped from the Times at the time the young lady school teachers were employed,—isn't it a fact he said Miss Giles, a public stenographer, had that list?

A. No, there was no name mentioned in connection with the list.

Q. Well, public stenographer,—didn't he use the public stenographer's name?

A. He said Miss Gilts; we were talking about Miss Giles all through.

Q. Isn't it a fact that Dr. Dysart said to you that Miss Giles used those envelopes of the Warehouse Company and that they were mailed out by mistake?

A. There was no conversation about those envelopes at all.

Dr. Dysart told me Miss Giles mailed the circulars out by mistake, and he said that they were never intended to be mailed out to anybody except doctors; that he never intended to mail them out to young lady school teachers; and it was a mistake they were sent to young lady school teachers.

[fol. 87] Redirect examination:

That was in the same conversation that he denied having married Miss Giles.

(Witness excused.)

Counsel for the Government: There was a letter identified by the stenographer for Judge Weeks, which was a letter identified by Miss Clara May, I would like to offer that in evidence as a specimen covering all of these counts.

Counsel for defendant: Well, if he has a letter that was mailed out, if he will say that is a facsimile of the letter that is mailed we would, of course, have no objection, but not on the ground we had it.

Counsel for the Government: I don't make any claims as to its coming from you. You have agreed that the school teachers named in the indictment received a letter and card——

Counsel for defendant: You mean this is a facsimile of the letter and card that each of the school teachers received?

Counsel for the Government: Yes,—and one that is identified by Miss Clara May.

Counsel for defendant: We object to the card on the ground that the indictment just alleges a card: it does not allege it is a printed card, or a written card, or any character of card, except it is a card, and I want to bring to the attention of the Court that objection and save the point as to the card. But as to this letter we object to this letter because the indictment alleges a letter, and his is not a letter, this is a circular.

The Court: Both objections are overruled.

[fol. 88] Counsel for the Defendant: Give us our exception, your Honor.

The Government thereupon introduced in evidence the letter marked for identification, and identified by the witness Miss Clara May, same being marked "Govt. Ex. 5," and being in words and figures as follows:

GOVT. EX. 5 FOR IDENTIFICATION. R. L.

(Here follows letter, being in the same identical words and figures as that shown in the Indictment herein, in the First Count thereof.)

(Endorsed:) No. 5703 Cr. The United States vs. John Carlton Dysart. Govt.'s exhibit No 5 Filed January 21, 1924. D. H. Hart, Clerk; by J. N. Phillips, Deputy Clerk.

(The Government introduced in evidence card identified by Miss Clara May, same being marked "Govt. Ex. 6," and being in words and figures as follows, to-wit:)

Here follows card, being in the same identical words and figures as the card shown in the Indictment herein, in the First Count thereof.

(Endorsed:) No. 5703 Cr. The United States vs. John Carlton Dysart. Govt.'s exhibit No. 6. Filed January 21, 1924. D. H. Hart, Clerk, by J. N. Phillips, Deputy Clerk.

The Government introduced in evidence, as being a facsimile of the envelopes which were addressed to the parties named in the first ten counts in the indictment, an envelope, which is in words and figures as follows:

[fol. 89] GOVT. EX. 7—Filed Jan. 21, 1924

[After 5 days return to]*
[International Warehouse Co.,]*
[Box 214,]*
[El Paso, Texas.]*
(Post marked:) El Paso, No. 9, 2 7 30 P. M., 1923, Texas
2c Postage Stamp cancelled.

[*Words and figures enclosed in brackets erased in copy.]

Miss Bertha Watson,

c/o Bailey School, El Paso, Texas

[File endorsement omitted.]

The Government rests.
The defendant rests.

[Title omitted]

DEFENDANT'S MOTION FOR VERDICT—Filed Jan. 21, 1924

Now comes the defendant and moves the Court to instruct the jury peremptorily to return a verdict for the defendant upon the ground that the Government has failed to prove that the defendant placed in the United States mail, or authorized the placing therein, of any of the circulars or literature described in the indictment, to the per-
[fol. 90] sons named in the indictment, and on the contrary the Government has affirmatively proved by putting in evidence the conversation had by the witness Snider with the defendant that the defendant did not mail or authorize the mailing of the circular letters described in the indictment, and that the same was mailed, if at all, by mistake and without his knowledge or consent.

The defendant further moves the Court to instruct a verdict of not guilty for the further reason that there is no explanation by the evidence and from the evidence as to the meaning of any word or words in said letter or card other than the plain language of the letter and card, and that said letter and card when reasonably construed show upon their face that the same are not lewd, lascivious or obscene, there being no innuendoes in the indictment and no proof offered that they have any other meaning except the common acceptation of the words used by the card and circular, and that said circular and card are not upon their face, of either of them, lewd, lascivious or obscene and there is no issue of fact to be submitted to the jury.

Wherefore the defendant moves the Court to instruct a verdict of not guilty.

G. C. Morris, Jno. F. Weeks, Attorneys for Defendant.

[File endorsement omitted.]

ARGUMENT OF COUNSEL

Thereupon the court recessed until the following day, to-wit: Tues-
[fol. 91] day, the 22nd day of January, A. D. 1924, at 9:30 o'clock a. m., and the argument of counsel was resumed.

Excerpts from Argument of Counsel for the Government

I sat here this morning during Judge Week's argument, and I trembled with fear that I would not be able to present this thing in the manner that it should be presented to you, for I knew, and I know it now, that I am speaking backed by the purity of a community which we hope we shall be able to preserve, and I am backed with a sense of rightcousness to try to sup-ress and forever cut out the iniquitous practice of anyone who seeks to prey upon the lack of virtue in our womanhood. This letter was adroitly written, written by a shrewd and deliberate man, a man who sought at the time, in February or March of last year when this letter was printed, to forstall a prosecution, a man who at that time saw fit to say in here "Dear Doctor" in a letter that he knew full well was not intended for doctors. Where, in all of this literature, I ask you do you see any mention of an obstetrical room; where do you see any mention of the paraphernalia and apparatus that doctors are concerned in when they have a case which calls for the delivery of a child. Many of you are fathers, and I am a father, and I know and you know what the doctors look to when they take our wife or your wife to the delivery room for that most delicate operation of all. And where, I ask you, in that letter is there one thing that appeals to a doctor? It is not there. And so, I say that man was shrewd from the very start, and he had an idea perhaps instilled by some lawyer in this town under whose advise he was acting that perhaps this letter might be objectionable to Uncle Sam when it goes through his mails.

"Dear Doctor." Yes. Doctors in Arizona and New Mexico, as [fol. 92] they would have you believe, from the directories that that little girl used, and yet I ask you why did he have to tell a doctor in Arizona or New Mexico to call phone East 642 and he would send a taxi to call for him? Just think over that, if you will. And that is why I say we are dealing with a shrewd and unscrupulous man. "Dear Doctor,"—far up in the State of New Mexico or the State of Arizona——

Counsel for defendant: We object to that statement, shrewd and unscrupulous; there is no evidence of that.

Counsel for the Government: All right, I will draw my conclusions from the letters.

Counsel for the defendant: I just make the exception.

The Court: The exception is noted.

Counsel for the Government (Continuing argument): "Dear Doctor," in the State of New Mexico or the State of Arizona, do you phone Dr. Dysart here in El Paso if you want the information?" That is what he said, that stenographer put on there. All right. Where do you find that in everyday practice, that a doctor should phone him from Arizona and New Mexico, and put this down when you consider this verdict, that there is not one syllable of evidence that one of these letters ever went to a doctor in El Paso, Texas. No, sir. Not one to a doctor in El Paso, Texas, and yet two hundred of

these letters in Bob Oliver's envelopes went out to our women of El Paso, Texas, and that is what I am kicking about.

Now this thing, it was supposed to go to doctors. Keen stuff, I would say; keen stuff thought of in February and March of 1923, and yet this paragraph or this item of calling a taxi was in the original manuscript. Mind you, it is not a letter head that was printed and [fol. 93] kept in stock and then other stuff printed down at the bottom of it; in the original manuscript at the time, I tell you, men. There is not a man living that is so smart that he does not fall sometime, and that is the case with our good friend, Dr. Dysart, in this instance. In March and February of last year he had the whole document printed, and it shows it was intended then for general use, except that he wanted to put in there to save his own scalp in case Uncle Sam got sore about it, we will say "Dear Doctor." Let's come around to this "Dear Doctor" business. Dysart told Miss Giles to mail this stuff out, what he told her we do not know. He claims they should have gone to the doctors. Nobody can refute that except Miss Giles, and as far as this Court is concerned and this case he might as well have killed Miss Giles so far as her testimony would go, for, under the rules of this Court, a man's wife can't testify either for or against him in any case. Now, Weeks in all of his supposed fairness told you that he was willing for her to come up here and all that sort of bunk, and he knew well, for he says he knows the law of this case, that she could not come. And he knew well that this indictment was returned in this Court on November 27th, and that seven days or eight days afterwards, on December 5th, his client married the prosecuting witness to cut off any rebuttal on this doctor theory that he now seeks to inject into this case, and he talks about fairness, that he is willing to have that woman come up here. Yes, a man that thought to put "Dear Doctor" in that letter in February would think to marry the only one that could controvert that issue, eight days after he was indicted, and forever preclude her from testifying. Well, a man that would send a letter like that to our school teachers would not hesitate to pervert justice by marrying our witness. And so I say there is nothing in this doctor business whatsoever.

[fol. 94] I will submit to you that if Miss Giles is good enough to run a public stenographic office, and to do work for such firms as Hixon's and the Popular, as the testimony shows, and Bob Oliver's work, of the International Warehouse Company, is that the kind of girl that is going to send out two hundred letters by mistake? Let me tell you this: Suppose she did send out two hundred letters by mistake, do you think that man would cut her off from testifying in this Court by a marriage ceremony in Las Cruces, New Mexico? No, sir,—no, sir, he would not because it is presumed that Miss Giles would tell the truth if she made a mistake. So I say this man intended these things to go to the school teachers and to the women of our city in order that yellow gold might flow into his hands at the expense of woman's virtue. That is the most terrible condition of human mind that I can conceive of, and when that condition of

human mind is put into the United States mails it is time that the Government of the United States would step to the front and say, "You can't do it," and it is time that a jury of this community would step to the front alongside of their government and alongside of these girls and say to that man "It cannot be done, and we won't stand for it."

They harp on what Snider said, that he (Dr. Dysart) intended those letters to go to doctors. I don't question Snider's truth and veracity in this case; he said what the Doctor told him; but I do question the truth and veracity of that self-serving statement that he made to Snider and I question the truth of that statement in connection with his statement about his marriage, because that to his mind at that time seemed to be self-serving, and he put it just as he thought would suit him best. All right, then, in the same breath he denied about his marriage to Snider and said he had never married Miss Giles, when Miss May tells you she was up in Las Cruces and saw [fol. 95] them get married on December 5th. Then can you believe his statement made in his own interest, and not under oath? Can you believe that statement that he intended these things to go only to the doctors? I don't think so,—I don't think so. All the way through this thing shows that it is not the doctors' patronage that he wants, but the hidden, obscure trade from women who don't want publicity; that is the kind of trade he is after and not that which comes through another doctor. Now, I say you can't believe that statement because it is made at the time that he lied about a thing you know is a lie from this case, and it is made in his own selfish interests, and it is not made under oath of any kind.

I will say to you if you haven't decency enough after reading that letter and that card to say that this man ought to be stopped from sending those things to our girls then I am sorry for this community, and I hesitate to think what our sense of decency and right and wrong might be. I may be somewhat of a Puritan; I know one thing full well, I believe in the purity of womanhood, and I will do all I can to protect them, and in so doing I am trying to urge upon you to do that, whatever you may have done that you ought not to have, what you may have not done that you ought to have done, will have no bearing on this case, for I know you are men enough, you have sense of decency enough and you are feeling the pulse of this community, which is to a sense of decency so that you will have no desire to see any girls in the future led wrong, led wrong I say simply because Dr. Dysart wants to make a business proposition out of fallen virtue, and wants to take the women, after they shall have fallen, out there and take care of them for dirty yellow gold.

Thereupon the Court delivered his oral charge to the jury as follows:

(See page 18.)

[fol. 96] Counsel for defendant: The defendant excepts to the Charge of the Court upon the ground that the matter charged in the indictment is so clearly not lewd, lascivious or obscene that no issue

as to its meaning should be submitted to the jury, but the Court should charge the jury peremptorily.

And thereupon counsel for the Defendant in writing requested the following instruction to the jury.

Defendant's Special Charge No. 1

(See page 22.)

Defendant's Special Charge No. 2

(See page 23.)

which was by the Court refused.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY—Filed Jan. 22, 1924

[Title omitted]

Defendant's Special Charge No. 3

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that in order for you to determine whether or not the card and letter or either of them as mentioned in the indictment, are obscene, lewd and lascivious is whether their language has a tendency to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands they may fall, by arousing or im-[fol. 97] planting in such mind obscene, lewd and lascivious thoughts or desires.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

which was by the Court refused.

Defendant's Special Charge No. 4

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that written letters which are merely abusive, scurrilous, improper, intemperate, unjustifiable, offensive, vulgar, or highly reprehensible or even libelous are not within the prohibition of the statute under consideration under which this defendant is indicted and if you believe from the evidence that the card and letter mentioned in the indictment and offered in evidence are scurrilous, improper, intemperature, unjustifiable, offensive, vulgar or highly [fol. 98] reprehensible or even libelous unless you further believe that the letter and card upon its face is obscene, lewd and lascivious,

as that term has been heretofore defined to you, your verdict shall be for the defendant and you will say by your verdict not guilty.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

which was by the Court refused.

Defendant's Special Charge No. 5

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that although you may believe that the language of the letter and card is exceedingly coarse and vulgar, as applied to an individual libelous, but unless you further believe that said card and letter is obscene, lewd and lascivious and has a tendency calculated to corrupt and debauch the mind and morals of those into whose hands it [fol. 99] might fall it is not within the meaning of this section under consideration, and unless you so believe it will be your duty to return a verdict of not guilty.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

which was by the Court refused.

Defendant's Special Charge No. 6

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that before you can convict the defendant in this case you must find beyond a reasonable doubt that the card and letter charged in the indictment and offered in evidence is obscene, lewd and lascivious and has a tendency calculated to corrupt and debauch the minds and morals of those into whose hands it may fall, and unless you do so [fol. 100] find your verdict should be for the defendant, and you will say thereby not guilty.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

which was by the Court refused.

Defendant's Special Charge No. 7

(See page 24.)

Defendant's Special Charge No. 8

(See page 25.)

Defendant's Special Charge No. 9

(See page 26.)

Defendant's Special Charge No. 10

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that the words "Obscene, Lewd and Lascivious" when construed [fol. 101] together as used in this statute signifies that form of immorality which has relation to sexual impurity.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

which was by the Court refused.

Defendant's Special Charge No. 11

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that in determining whether or not the letter and card alleged in the indictment and offered in evidence before you, as the language of the statute is highly penal and should not be held to embrace language unless it is fairly within the letter and spirit of the statute; and, if you have a reasonable doubt as to whether said card and letter embrace such language and that such language is fairly within the [fol. 102] meaning of the letter and spirit of the law, as the same has been given you in previous instructions, it will be your duty to return a verdict of not guilty.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

which was by the Court refused.

Defendant's Special Charge No. 12

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that the statute under consideration which has been heretofore given you in this charge is highly penal and you should acquit the defendant unless you find from the evidence that the alleged obnoxious language is within its letter and spirit.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

[fol. 103] Refused: W. R. Smith, U. S. District Judge.

which was by the Court refused.

Defendant's Special Charge No. 13

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that you can not convict the defendant unless you find beyond a reasonable dobut that the card and letter alleged in the indictment and offered in evidence would in the opinion of reasonable persons tend to deprave or corrupt the morals of reasonable persons and would suggest to the minds of either sex thought of an impure or libidi-ous character, and unless you so believe you should acquit the defendant and say by your verdict not guilty.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

[fol. 104] Refused: W. R. Smith, U. S. District Judge.

which was by the Court refused.

Defendant's Special Charge No. 14

GENTLEMEN OF THE JURY: You are instructed at the request of the Defendant, and the same is given you as a part of the law in this case, that to warrant a conviction you must believe beyond a reasonable doubt that the card and letter was intended to be mailed and was in fact mailed by the defendant or under his direction, to the women named in the indictment, and if you have a reasonable doubt as to that it would be your duty to return a verdict of not guilty notwithstanding you may believe the defendant directed the mailing of such circulars to doctors.

F. G. Morris, J. F. Weeks, Attorneys for Defendant.

Refused: W. R. Smith, U. S. District Judge.

[fol. 105] [File endorsement omitted.]

which was by the Court refused.

Counsel for defendant: Defendant excepts to the refusal of all the special charges which the Court has refused to give and which were requested by the Defendant.

Thereupon the jury retired in the custody of the Marshal.

Thereupon, on Saturday, January 26, 1924, the Defendant presented a Motion for a New Trial, as follows:

(See page 27.)

The Defendant thereupon presented his Motion in Arrest of Judgment as follows:

(see page 28.)

which was by the Court overruled and the defendant excepted.

The above and foregoing sets out truly and correctly all matters, things and proceedings, involved in this case, and it is respectfully

prayed that this Bill of Exceptions be by the Court settled, allowed, approved, signed, sealed and ordered filed and made a part of the record herein, this the — day of ——, A. D. 1924.

—— ——, Attorneys for Defendant, John Carlton Dysart.

[fol. 106] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The above and foregoing Bill of Exceptions having been submitted to and examined by me, and being found correct is hereby approved this the 16th day of February, A. D. 1924.

John D. Hartman, United States Attorney for the Western District of Texas, by N. J. Morrisson, Assistant United States Attorney.

On this the 16 day of February, A. D. 1924, the foregoing Bill of Exceptions having been presented to me, and having been found correct it is hereby in all respects, settled, approved, allowed, signed, sealed and ordered filed, and made a part of the record in this case.

W. R. Smith, United States District Judge.

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

THE UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the United States District Court for the Western District of Texas, hereby certify that the foregoing on — pages, is a true and correct transcript of the proceedings had and orders entered (as therein stated) in cause No. 5703 criminal, entitled, The United States vs. John Carlton Dysart, as the same appear on file and of record in this office, and includes the original writ of error and citation in error at pages 52 and 53 respectively, besides copies thereof.

And I do further certify that the foregoing transcript embraces [fol. 107] only such instruments and orders as are specified in the præcipe filed by the plaintiff in error and agreed to by the defendant in error.

Witness my official signature and the seal of said court, hereto affixed in the City of El Paso, Texas, this 23rd day of February, A. D. 1924.

D. H. Hart, Clerk, by —— ——, Deputy Clerk. J. N. Phillips. (Seal.)

[fol. 108] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 4294

JOHN CARLTON DYSART

versus

UNITED STATES OF AMERICA

ARGUMENT AND SUBMISSION—Feb. 23, 1925

On this day this cause was called, and, after argument by J. M. Nealon, Esq., for plaintiff in error, and N. J. Morrisson, Esq., Assistant United States Attorney, for defendant in error, was submitted to the Court.

[fol. 109] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION—Filed March 11, 1925

John F. Weeks and J. M. Nealon (Joseph M. Nealon and Joseph McGill on the brief), for Plaintiff in Error.

N. J. Morrison, Asst. U. S. Atty., and H. R. Gamble, Special Asst. to U. S. Atty. (John D. Hartman, U. S. Atty., H. R. Gamble, Asst. to U. S. Atty., and Norman J. Morrisson, Asst. U. S. Atty., on the brief), for Defendant in Error.

Before Walker, Bryan and Foster, Circuit Judges

WALKER, Circuit Judge:

The plaintiff in error was convicted under all of the eleven counts of an indictment which charged that he knowingly deposited and caused to be deposited in the post office at El Paso, Texas, for mailing, conveyance and delivery through the United States mails, a letter and printed card inclosed in an envelope; which letter and card were copied in the first count, and were alleged to be obscene, lewd [fol. 110] and lascivious. Each of the counts set out an address and direction of an envelope containing said letter and card; ten of the counts alleging that the envelope was addressed and directed to an unmarried female, named in said counts, respectively. The eleventh count alleged that envelopes containing said letter and printed card were addressed and directed to the several females therein respectively named. Said card contained a picture of a building, called "the Queen Anne Home," the street location thereof, and the following: "This institution is specially a private retreat for unmarried preg-

nant women who prefer to be away from home during pregnancy and confinement to preserve individual character or family reputation." The letter contained a caption which set out the same picture, statement of location, and the following: "Take taxi to the corner of Piedras and Van Buren Streets, or call phone East 642, and we will call for you." Below the caption were the words "Dear Doctor." The body of the letter contained, in addition to other matter, the following:

"Realizing the need of those who, having made a misstep find it necessary to leave home at this critical period.

We have established our home for their protection and care until the time when they may return to their homes and friends free, from the burden of their mistake, to become useful members of society.

We find homes for infants by adoption when desired, or provide board for them at reasonable rates.

* * * * * * *

We accept only such persons as are recommended by reputable Physicians, therefore our patients come from the best families and do not run the risk of having to meet or associate with objectionable characters."

At the end of the letter were the name of the accused, the words "Resident Physician," and two telephone numbers. By a so-called motion to quash the indictment and by a motion in arrest of judgment, the accused questioned the sufficiency of the indictment on the grounds that no count thereof alleges an offense against the laws of the United States, and that the alleged letter and card are not in contents or meaning, directly or indirectly, obscene, lewd, or las-
[fol. 111] civious, and do not constitute non-mailable matter. At the conclusion of the evidence the defendant moved the court to instruct a verdict of not guilty, and excepted to the court's refusal to do so.

The indictment is based upon Section 211 of the Criminal Code, as amended in 1911, Comp. Stat. 1916, §10381. That section contains the following:

"Every obscene, lewd or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * is hereby declared to be non-mailable. * * * Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery anything declared by this section to be non-mailable, * * * shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

Matter is obscene, lewd or lascivious within the meaning of the quoted statute if it is offensive to the common sense of decency and modesty of the community, and tends to suggest or arouse sexual desires or thoughts in the minds of those who by means

thereof may be depraved or corrupted in that regard. Rosen v. United States, 151 U. S. 29; Swearingen v. United States, 161 U. S. 446; Dunlap v. United States, 165 U. S. 486; Magen v. United States, 248 Fed. 201; Knowles v. United States, 170 Fed. 409; 31 Cyc. 1003. It is for the court to determine in the first instance whether the matter in question is capable of having such a tendency, and, if the court finds that it has such capacity, for the jury to determine whether it does or does not in fact have such tendency. Rosen v. United States, supra; Magon v. United States, supra. The vicious tendency of a letter or publication in question may be the result of inuendo or suggestion, of its being so devised as to have capacity to give rise to illicit sexual desires or thoughts. In behalf of the accused it was contended that the charged advertising of his maternity or lying-in institution was incapable of having such a tendency. It is [fol. 112] not doubted that it is permissible to use the mails in making known the existence and claimed merits of such an institution. But an advertisement of such an institution is non-mailable if it is so devised as to serve the purpose of implanting lewd or lascivious thoughts in the minds of those to whose notice it is directly brought. We think that a denial of the power or influence of suggestion would be involved in affirming that statements to the effect that a named institution is a private retreat for unmarried pregnant women coming from the best families, and affords to such females a convenient means of concealing the results of their missteps, is incapable of giving rise to sexual thoughts or desires in the minds of unmarried females to whose notice such statements are brought. Commendation of existing facilities for avoiding possible unpleasant social consequences of conduct in pursuance of illicit sexual desires may be the means of covertly suggesting such desires to those whose actions are largely the result of social influences and restraints. The method adopted to bring to the notice of unmarried females and institution described as "specially a private retreat for unmarried pregnant women" may be inconsistent with customary standards of decency, though the use of indecent or obscene language is avoided. To say the least, we are of opinion that reasonable men might differ in passing on the question whether the above mentioned letter and card were or were not obscene, lewd and lascivious, when used in the manner alleged, and that the court did not err in ruling that the indictment was not subject to objection on either of the grounds set up.

Evidence adduced tended to prove the material allegations of each count of the indictment. It was contended that the evidence was insufficient in the matter of the mailing of the envelopes containing [fol. 113] said letter and card, and addressed as alleged. There was evidence to support findings that such envelopes were mailed by a female stenographer who was employed by the accused, and who became the wife of the accused a few days after the indictment was returned, and that said stenographer acted at the instance of the accused in addressing and mailing the alleged non-mailable matter. The court did not err in refusing to instruct the jury to find a verdict of not guilty.

Statements made by counsel for the Government in his argument to the jury are complained of. No ruling of the court was invoked as to the part of that argument which is complained of in this court. That conduct of counsel is not a ground of reversal in the absence of an exception to action of the court in regard thereto.

The record shows no reversible error. The judgment is affirmed.

[fol. 114] In United States Circuit Court of Appeals

[Title omitted]

Judgment—March 11, 1925

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

[fol. 115] In United States Circuit Court of Appeals

[Title omitted]

Petition for Rehearing—Filed March 30th, 1925

Comes now John Carlton Dysart, Plaintiff in Error in the above styled and number cause in which judgment was rendered by this [fol. 116] Court affirming the judgment of the District Court of the Western District of Texas, El Paso Division, said judgment being entered on Wednesday, March 11th, 1925, and within twenty days therefrom and at the same term of court files this his motion for rehearing, and for ground thereof respectfully represents:

First

The Court erred in holding that any evidence had been adduced to prove that the circulars and letters described in the indictment as having been addressed to the various addressees named in the indictment were ever placed in the United States mails, there being no affirmative evidence to this effect. No one testified that any one of the addressees named in the indictment received any of the letters or cards. There is this statement made by counsel for the government (Tr. 87):

"You have agreed that the school teachers named in the indictment received a letter and card?"

and this question by counsel for defendant:

"You mean this is a facsimile of the letter and card that each of the school teachers received?"

to which counsel for government replied:

"Yes, and one that is identified by Miss Clara May."

Plaintiffs in error's proposition is that this being part of the record may effect a stipulation that such card and letter were received by the school teachers named in the indictment, but it does not stipulate that such card and letters were received through the mails, and as no one testified that any envelopes so addressed, or any letters and cards of the kind and character described in the indictment were either mailed to or received through the mails by any [fol. 117] one of the persons named in the indictment, no case was made for the government by the evidence.

Authority

Harvey vs. United States, decided by Circuit Court of Appeals, Second Circuit, 126 Fed. 357:

"Where, in a prosecution for unlawfully depositing in the United States mails unmailable matter, it was not shown that the box claimed to have been unlawfully mailed had ever been in the post office, either by marks thereon or by evidence of post office employes, and the recipient did not testify that it came to him from the mail, but was careful to say only that he 'received it,' without stating from whom, the evidence was insufficient to sustain a conviction. * * * There should be some affirmative evidence to show that the package was at one time in the mails."

U. S. vs. Brazeau, 78 Fed. 464.
Price vs. U. S. 165 U. S. 311; 41 L. Ed. 727.

Second

The Court erred in its opinion in giving any weight to the evidence that Miss Giles, the public stenographer who it was claimed mailed the letters and cards, became the wife of the accused a few days after the indictment was returned, because such stenographer would not have been a compellable witness had the marriage not occurred, since she would (if the matter complained of was non-mailable, and if she put it in the mails) have herself been guilty, and therefore would have had the right to claim her privilege not to testify.

Third

The Court erred in finding as a fact that Miss Giles, the steno- [fol. 118] rapher who it was claimed mailed the alleged non-mailable matter, was an employe of the accused, the evidence being that she was a public stenographer, (Tr. p. 65) and therefore an independent

contractor in any work she did for plaintiff in error; and plaintiff in error was not criminally liable for her acts upon any theory that she was his agent, nor should guilt be imputed to him, even if she were his agent, on account of her acts, unless it was shown that he knew of such acts and authorized them, and there is no evidence that he knew that she was going to mail any of the mail matter described in the indictment to any of the addressees named in any of the counts of the indictment, or to any teachers. An examination of the evidence as shown in the bill of exceptions (Tr. 56 to 87) will reveal that the names of none of the addressees were mentioned by any of the witnesses, nor do any of them state that the names of any of the said addressees appeared on any of the lists referred to in evidence as being in the possession of Miss Giles, the stenographer. (Tr. pp. 65 to 68).

Authority

Hipp vs. State, 33 Am. Dec. 463.
16 C. J. 123, Sec. 105.

Fourth

The Court erred in holding, as is the necessary effect of its decision, that mail matter commending existing facilities for avoiding possible unpleasant social consequences of conduct in pursuance of illicit sexual desires is within the prohibition of the Statute in this case where the only facilities advertised are those appertaining to a maternity hospital, and which are solely medical and nursing attention furnished during confinement and pregnancy and in private [fol. 119] so that the one who has made a misstep shall be shielded from publicity, because such holding cannot be reconciled with the evident intention of Congress in enacting the legislation as evidenced by the action of Congress in including within the prohibition of the Statute, advertisements of articles and things designed or intended for the prevention of conception, or procuring abortion, or furnishing information as to where such matters, articles or things might be obtained, etc., the purpose of the Act being to preserve life, and such being the advertised purpose of the institution described in the printed matter complained of in the instant case.

Plaintiff in error's proposition is: That Article 211 of the Criminal Code should be looked to in its entirety to determine the intention of Congress in enacting said Article, and that the advertising matter complained of in the instant case is merely an offer of facilities for carrying out the evident purposes of Congress in enacting Article 211, and hence when such advertisement is couched in decent language (which is found by the Court in this case) and is not suggestive in detail, it cannot come within the prohibition intended by Congress, because as held by the Circuit Court of Appeals of the Seventh Circuit in Bours vs. U. S. 229 Fed. 960 at page 964, the rule of giving a reasonable construction in view of the disclosed national purpose would exclude those acts that are in the interest of the national life.

Fifth

The Court erred in not confining its opinion of the effect of the reading of the advertisement described in the indictment, to its effect upon the minds of the persons addressed, it being inconceivable that the court would hold that such reading matter would be capable of giving rise to illicit sexual thoughts or desires in a [fol. 120] class of persons of such high intelligence and character as public school teachers, persons who are not only trained in intellect, but one of whose duties it is to guide the morals of their pupils. In this class of cases the inquiry must be narrowed as to the effect of the circular or letter upon the minds of the persons to whom it is mailed. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused.

Authority

U. S. vs. Wroblenski, 118 Fed. 495.
U. S. vs. Chase, 135 U. S. 255; 34 L. Ed. 117.
U. S. vs. Benedict, 155 Fed. 221.
U. S. vs O'Donnell, 165 Fed. 218.
U. S. vs. Morris, 14 Pet. 464.
U. S. vs. Wiltberger, 5 Wheat. 76.
U. S. vs. Wilson, 58 Fed. 768.

Sixth

The Court erred in not holding as a matter of law that a communication furnishing school teachers in their capacity as the moral guides of those under their charge information as to the facilities of a maternity home, is excepted from the prohibitions of Article 211 of the Criminal Code when such communication is couched in decent language, and contains no suggestive detail, upon the same theory that such communications when addressed to physicians are excepted from the operation of such law.

The proposition here advanced is that should any of their pupils communicate to the teachers that they had erred in the manner deferred to in the discussion of this case, and that normal physical [fol. 121] consequences were about to ensue, such teachers would in their capacity as moral guides desire their charges to observe and not violate the law, and it would therefore be legitimate to furnish them information as to the existence and facilities of institutions established for the care of unmarried females who were pregnant

Hanson vs. U. S. (C. C. A. 7th Circuit) 157 Fed. 749.

Seventh

The Court erred in holding that it is necessary in a case where the remarks of counsel are practically appeals to a jury to be guided by public sentiment and convict on account of such sentiment, that it is

necessary to invoke a ruling of the trial court as to such argument. It is respectfully submitted that in such cases the controlling rule is that recognized by this court in Latham vs. U. S., 141 C. C. A. 250, 226 Fed. 420, where it is recognized that there are exceptional cases where although the Court does stop counsel and caution the jury, the impression has been made by the remarks of counsel, and although the jury honestly try to ignore that impression, it still enters into and forms a part of the verdict, and this class of errors comes within paragraph 4, Rule XXIV of this court, to the effect that the Court at its option may notice a plain error not assigned or specified, and also within the terms of the Act of February 26, 1919, providing that:

"in any case civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the right of the parties."

August vs. U. S., 257 Fed. 388.
Stakes vs. U. S. 18.
[fol. 122] Bombarger vs. U. S. (5th Circuit) 219 Fed. 841 at p. 844.
Martin vs. State, 63 Miss. 505.
Rudolph vs. Landwerlen, 92 Ind. 34.
People vs. Wells, 34 Pac. 1078.
People vs. Bowers, 79 Cal. 415; 21 Pac. 752.
People vs. Montague, 71 Mich. 437; 39 N. W. 585.
Klink vs. People, 16 Colo. 467; 27 Pac. 1062.
Gawn vs. State, 13 Ohio C. C. 116.
State vs. Gutekunst, 24 Kansas 183.
Berry vs. State, 10 Ga. 511.

Wherefore, premises considered, plaintiff in error prays that a rehearing be granted herein, and that on such rehearing the judgment of the District Court of the El Paso Division of the Western District of Texas be reversed, and for such other and further relief as he may be entitled to in the premises.

(Signed) Joseph M. Nealon. Joseph M. Nealon, of El Paso, Texas; Joseph McGill, of El Paso, Texas, Attorneys for Plaintiff in Error.

UNITED STATES OF AMERICA,
Western District of Texas,
State of Texas,
County of El Paso:

I, Joseph M. Nealon, one of the counsel in the above styled and numbered cause, do certify that I believe that there is merit in the [fol. 123] foregoing application for rehearing and that the same is not filed for delay.

(Signed) Joseph M. Nealon.

Before me, the undersigned authority, on this day personally appeared Joseph M. Nealon, counsel for plaintiff in error, who upon oath says that in his opinion there is merit in the foregoing application for rehearing, and that the same is not filed for delay.

(Signed) Joseph M. Nealon.

Sworn to and subscribed before me this — day of March, A. D. 1925. (Signed) Mildred W. Baker, Notary Public in and for El Paso County, Texas. My commission expires May 31, 1925. (Seal.)

[fol. 124] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Petition for Rehearing

It is ordered by the Court that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

[fol. 125] In United States Circuit Court of Appeals

Clerk's Certificate

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 108 to 124 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4294, wherein John Carlton Dysart is plaintiff in error and The United States of America is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 107 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 9th day of April, A. D. 1925.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 125] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 8, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

	Page
Opinion below	1
Jurisdiction of this court	1
Statement	2
The applicable statute	5
Questions presented	6
Argument:	
I. Construction of the statute	6
II. There was evidence before the jury to support its finding that petitioner was responsible for the mailing of the card and letter	13
III. Argument of the United States attorney to the jury was not improper if the circulars were unmailable	16
Conclusion	17

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Griffin v. *United States*, 248 Fed. 6	7
Knowles v. *United States*, 170 Fed. 409	8
Magon v. *United States*, 248 Fed. 201	8, 10
Rosen v. *United States*, 161 U. S. 29	12
Saccaringen v. *United States*, 161 U. S. 446	6
United States v. *Harmon*, 45 Fed. 414	11
United States v. *Journal Co.*, 197 Fed. 415	9
United States v. *Kennerley*, 209 Fed. 119	9
United States v. *Klauder*, 240 Fed. 501	10
Statutes:	
Act of February 13, 1925, c. 229, 43 Stat. 936, 938	1
Criminal Code, sec. 211	2, 5, 6, 11
Revised Statutes, sec. 3893	6, 11

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 102

JOHN CARLTON DYSART, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals may be found at page 59 of the Record. It is also reported in 4 F. (2d) 765.

JURISDICTION OF THIS COURT

The judgment to be reviewed was entered on March 11, 1925. (R. 62.)

Writ of certiorari was granted on June 8, 1925 (R. 68), pursuant to the provisions of the Act of February 13, 1925. (C. 229, 43 Stat. 936, 938.)

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Texas, under an indictment charging him in eleven counts, with depositing and causing to be deposited for mailing at El Paso a certain described printed card and letter alleged to be "obscene, lewd, and lascivious," in violation of Section 211 of the Criminal Code. (R. 1 et seq. and 15.) The several counts of the indictment differ only as to the name of the party to whom the card and letter were addressed.

The card and letter forming the basis of the several counts in the indictment read as follows (R. 2 et seq.):

> The only place in El Paso where ladies can have home comforts. The best of care and perfect seclusion during pregnancy and confinement.
>
> (Picture of the Queen Ann Home)
>
> THE QUEEN ANN HOME
>
> 4021 N. Piedras St. P. O. Box 413
>
> EL PASO, TEXAS
>
> A PRIVATE HOME FOR WOMEN DURING PREGNANCY AND CONFINEMENT. WITH EVERY FACILITY FOR THEIR CARE AND PROTECTION
>
> **This Institution is specially a private retreat for unmarried pregnant women who prefer to be away from home during preg-**

nancy and confinement to preserve individual character or family reputation.

DR. J. C. DYSART,
Resident Physician.

For Particulars Address
THE QUEEN ANN HOME
4021 N. Piedras St. P. O. Box 413
EL PASO, TEXAS

Charges Reasonable.
Correspondence Strictly Confidential
Phone M 3452 or East 821

Support the Institution that Protects Your Patient and Preserves the Good Name of the Present and Future Mothers of our Country

(Cut of the Queen Ann Home)
(Same as in Foregoing Card)

THE QUEEN ANN HOME
4021 N. Piedras Street, P. O. Box 413,
EL PASO, TEXAS

Take Taxi to the Corner of Piedras and Van Buren Streets or Call Phone East 642 and we will call for you.

Private Maternity Home for Women During Pregnancy and Confinement, with Every Facility for Their Care and Protection

DEAR DOCTOR: This is not a public hospital, where all kinds and classes are taken, or received, but a private home, where we are prepared to care for a few unfortunate women who do not wish to remain at home during pregnancy and confinement.

Realizing the need of those who, having made a misstep find it necessary to leave home at this critical period.

We have established our home for their protection and care until the time when they may return to their homes and friends free, from the burden of their mistake, to become useful members of society.

We find homes for infants by adoption when desired, or provide board for them at reasonable rates.

It is our aim to place at the disposal of the Medical Profession a respectable private Maternity home, conducted on strictly ethical lines, where they may send patients for advantages they cannot get at home.

We accept only such persons as are recommended by reputable Physicians, therefore our patients come from the best families and do not run the risk of having to meet or associate with objectionable characters.

Our charges are as low as can be made for the services and accommodations desired.

Physicians are cordially invited to visit us while in the city.

Address all inquiries to The Queen Ann Home. Dr. J. C. Dysart, Resident Physician. Phone M 3452 or East 821.

Although on its face intended for physicians, this circular was mailed to a number of young women school-teachers, as well as to physicians. (R. 39, 48, 50.)

The trial court charged the jury that "whether the letter and printed card were obscene, lewd and lascivious is for the exclusive determination of the jury." (R. 12.)

Motions to quash the indictment, for a new trial, and in arrest of judgment, all of which raised the question whether the mail matter involved constituted a violation of the statute, were overruled. (R. 10–11 and 15–17.)

In upholding the above action of the trial court, the Circuit Court of Appeals said (R. 61):

> Commendation of existing facilities for avoiding possible unpleasant social consequences of conduct in pursuance of illicit sexual desires may be the means of covertly suggesting such desires to those whose actions are largely the result of social influences and restraints. The method adopted to bring to the notice of unmarried females an institution described as "specially a private retreat for unmarried pregnant women" may be inconsistent with customary standards of decency, though the use of indecent or obscene language is avoided. To say the least, we are of opinion that reasonable men might differ in passing on the question whether the above-mentioned letter and card were or were not obscene, lewd and lascivious, when used in the manner alleged, and that the court did not err in ruling that the indictment was not subject to objection on either of the grounds set up.

THE APPLICABLE STATUTE

The indictment was drawn under Section 211 of the Criminal Code, which, so far as pertinent, reads as follows:

> Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * is hereby declared to be nonmailable matter * * *. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. * * *

QUESTIONS PRESENTED

Petitioner urges three points:

1. That the card and letter upon which the indictment is based are not obscene, lewd, or lascivious within the meaning of Section 211 of the Criminal Code.

2. That there was a failure of the evidence to establish that petitioner deposited or caused to be deposited for mailing the card and letter involved.

3. That the trial court permitted Government counsel to make "improper argument to the jury."

ARGUMENT

I

CONSTRUCTION OF THE STATUTE

In construing Section 3893, R. S., the predecessor of Section 211 of the Criminal Code, this Court said in *Swearingen* v. *United States,* 161 U. S. 446, 450:

> The offence aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The

> words "obscene," "lewd" and "lascivious," as used in the statute, signify that form of immorality which has relation to sexual impurity and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.
>
> Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libellous. But we can not perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.

After examining the reported cases, the Circuit Court of Appeals for the First Circuit thus announces the rule in *Griffin* v. *United States,* 248 Fed. 6, 8–9:

> The courts, in construing this statute, have held that the rule by which to "determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires" (*Knowles* v. *United States,* 170 Fed. 409, 412, 95 C. C. A. 579, 582; *Dunlop* v. *United States,* 165 U. S. 486, 500, 17 Sup.

> Ct. 375, 41 L. Ed. 799; *Rosen* v. *United States,* 161 U. S. 29, 43, 16 Sup. Ct. 434, 40 L. Ed. 606), and that it is not essential to the commission of the offense that the entire contents of the communication be objectionable in character (*Demolli* v. *United States,* 144 Fed. 363, 366, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424, 7 Ann. Cas. 121).

The same rule was laid down by the Circuit Court of Appeals for the Eighth Circuit in *Burton* v. *United States,* 142 Fed. 57, 63, and the Circuit Court of Appeals for the Ninth Circuit in *Magon* v. *United States,* 248 Fed. 201, 203.

The trial court below, in its charge to the jury, directed that body to apply the above-mentioned test in determining whether the card and letter here involved were obscene, lewd, or lascivious. (R. 13.)

The courts are now in apparent harmony as to the cases in which they should assume the function of determining whether any specified matter is or is not obscene, lewd, or lascivious.

In *Knowles* v. *United States,* 170 Fed. 409, 411, the Circuit Court of Appeals for the Eighth Circuit said:

> Whenever reasonable minds might fairly reach different conclusions as to the character of the writing, it is the duty of the court to submit the question to the jury. *Rosen* v. *United States,* 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *United States* v. *Bennett,* 16 Blatchf. 342, Fed. Cas. No.

14,571; *United States* v. *Davis* (C. C.) 38 Fed. 326; *United States* v. *Harmon* (D. C.) 45 Fed. 418.

In *United States* v. *Journal Co.*, 197 Fed. 415, 416, the United States District Court for the Eastern District of Virginia said:

> The question of the character of the contents of the paper—namely, whether it comes within the inhibited class named in the statute—is one ordinarily to be determined by the jury under appropriate instructions from the court—that is, when there is such doubt as to the meaning and effect of the same, that persons would reasonably differ in respect thereto. But, on the other hand, if the publication complained of be such that it could not by any reasonable judgment be held to come within the prohibition of the law, then it becomes the duty of the court as matter of law to pass upon the same. *Knowles* v. *United States*, 170 Fed. 409, 411, 95 C. C. A. 579, and cases cited; *United States* v. *Dempsey* (D. C.), 188 Fed. 450.

In *United States* v. *Kennerley*, 209 Fed. 119, 120, the United States District Court for the Southern District of New York thus states the applicable rule:

> Whatever be the rule in England, in this country the jury must determine under instructions whether the book is obscene. The court's only power is to decide whether the book is so clearly innocent that the jury should not pass upon it at all. *United States*

v. *Clarke* (D. C.), 38 Fed. 500; *United States* v. *Smith* (D. C.), 45 Fed. 478.

In *Magon* v. *United States,* 248 Fed. 201, 203, the Circuit Court of Appeals for the Ninth Circuit in defining the word "obscene" as meaning matter which "would tend to corrupt the morals of those whose minds are open to such influences," etc., said:

> * * * and that whether or not it had such tendency was a question for the jury. *Rosen* v. *United States,* 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Knowles* v. *United States,* 170 Fed. 409, 95 C. C. A. 579; *United States* v. *Bennett,* Fed. Cas. No. 14,571; *McFadden* v. *United States,* 165 Fed. 51, 91 C. C. A. 89; *Demolli* v. *United States,* 144 Fed. 363, 75 C. C. A. 365; *United States* v. *Musgrave* (D. C.) 160 Fed. 700; *United States* v. *Harmon* (D. C.) 45 Fed. 414; *United States* v. *Clarke* (D. C.) 38 Fed. 732.

In *United States* v. *Klauder,* 240 Fed. 501, 505, the United States District Court for the Northern District of New York said:

> On demurrer the court has only power to decide whether the book or paper or letter is so clearly innocent that a jury should not pass on it at all. *United States* v. *Kennerley* (D. C.) 209 Fed. 119. That can not be said in this case.
>
> The demurrer is overruled.

In *United States* v. *Harmon,* 45 Fed. 414, 417–418, the court was considering Section 3893, R. S., now Section 211 of the Criminal Code, and said:

> Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such can not be allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, what is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls—the family, which is the common nursery of mankind, the foundation rock upon which the state reposes? The question was asked with eloquent energy by the learned counsel, commenting on the term "deemed" to be obscene, as employed by Mr. Justice Field in *Ex parte Jackson, supra* (96 U. S. 727): Who is to deem, who is to judge, whether a given publication impinges upon the general sense of decency? Shall every postmaster have the power to deem the matter injurious to the public morals? Shall one postmaster deem a thing injurious and another harmless, and shall the freedom of the press be at the mercy of an indifferent

> lot of postmasters exercising no responsible discretion? The answer to this is, that asserted violations of this statute, like other criminal statutes, must be left to the final arbiter under our system of government—the courts. The jury, the legally constituted triers of the fact under the constitution, is to pass upon the question of fact. Under our institutions of government the panel of 12 are assumed to be the best and truest exponents of the public judgment of the common sense. Their selection and constitution proceed upon the theory that they most nearly represent the average intelligence, the common experience and sense, of the vicinage; and these qualifications they are presumed to carry with them into the jury box, and apply this average judgment to the law and the facts.

In *Rosen* v. *United States*, 161 U. S. 29, 43, this Court said:

> * * * But it is proper to add that it was competent for the court below, in its discretion, and even if it had been inclined to regard the paper as obscene, lewd, and lascivious, to submit to the jury the general question of the nature of the paper, accompanied by instructions indicating the principles or rules by which they should be guided in determining what was an obscene, lewd, or lascivious paper within the contemplation of the statute under which the indictment was framed.

II

THERE WAS EVIDENCE BEFORE THE JURY TO SUPPORT ITS FINDING THAT PETITIONER WAS RESPONSIBLE FOR THE MAILING OF THE CARD AND LETTER

The record discloses no such absolute failure of proof regarding petitioner's responsibility for the mailing of the card and letter here involved, as would justify this Court in reversing the judgment below on that account. The evidence that petitioner caused the circular to be mailed to physicians was clear. The evidence to support the charge that he intended it to be mailed to young women was enough for a jury, though not so conclusive.

The following admission by petitioner is included in the bill of exceptions at page 31 of the record:

> It was admitted in open court by the Defendant that each of the persons named in the indictment received a copy of the matter set out in the indictment, through the mails, and post marked El Paso, Texas, dated November 9, 1923.

As tending to show petitioner's responsibility for the mailing, Clara May, a Government witness, testified in part as follows (R. 36, 37–38, 44):

> I know Dr. John Carlton Dysart. I have known him more than a year. I have worked for him. I worked for Miss Giles some, I worked for her when I didn't have anything else to do, then I worked for Dr. Dysart, and then I worked for Miss Giles again.
>
> (Counsel handed witness Government Exhibits Nos. 3 and 4.)

I have seen a letter and a printed card similar to those. I saw them in Miss Giles's office, in 220 Trust Building. I don't know how I happened to see them—she was working on them, and everything that came in I looked at it. If I remember right there were about 500 of those printed letters and printed cards in Miss Giles's office. Those letters and cards were mailed out in Miss Giles's office.

* * * * *

I have seen Dr. Dysart in Miss Giles's office in connection with these letters; he came in to O. K. the proof she was putting on these letters, on the letter and the card. The proof that I have reference to that he O. K'd was the multigraph work which stated the name, resident physician, and the phone numbers. That seemed satisfactory to him, it was all right. I think Dr. Dysart O. K'd a proof in Miss Giles's office, but if he did he took it with him, because when the trial came up she looked for it and couldn't find it; then she said the Doctor took it back with him, the proof he O. K'd.

After this proof was O. K'd I saw Dr. Dysart in his office. I don't know the name of the building Dr. Dysart's office is in, but it is on the corner of San Antonio Street and Stanton Street, up above that cigar store; I don't know the name of the building. It is across the street, north of the Trust Building, upstairs above the United Cigar Stores. The occasion of my going over to his office was that I had a sore on my hand and Miss

Giles told me to go over there and have him treat it. Miss Giles told me while I was over there to kill two birds with one stone, and to ask Dr. Dysart if she should mail these letters, and he said yes, there wasn't any use bringing them over there when she could mail them. He said for her to mail them, there wasn't any use for her to bring them over—he said for Miss Giles to mail them, and he asked me about if she ran out of stamps, or how many more stamps she needed, and I told him I didn't know, and he said to have Miss Giles call him, and she did call him. I did not hear her call him, I went on with my work, I had something else to do.

I did not see Miss Giles mail these letters out. I think Miss Giles got all of those letters addressed ready to go out about November 9th. I think she completed the letters along towards the close of the day of November 9th.

* * * * *

Q. Do you know whether there is any relationship between Dr. Dysart and Miss Giles now which did not exist at the time these letters were sent out?

A. Well, I don't know, I couldn't say for sure.

Q. Did you ever have occasion to make a trip to Las Cruces with Dr. Dysart and Miss Giles?

A. Yes.

Q. What happened up there?

A. They were married, Dr. Dysart married Miss Giles.

> That was after these letters were mailed out—it was December 5th, they were married Wednesday, December 5th.
>
> * * * * *
>
> When I went over and had my hand treated Dr. Dysart told me to tell Miss Giles she could mail the letters out herself; there wasn't any need to bring them over to him. I conveyed that message to Miss Giles.

Lem Snider, also a Government witness, testified in part as follows (R. 48):

> Dr. Dysart told me Miss Giles mailed the circulars out by mistake, and he said that they were never intended to be mailed out to anybody except doctors; that he never intended to mail them out to young lady school-teachers; and it was a mistake they were sent to young lady school-teachers.

III

ARGUMENT OF THE UNITED STATES ATTORNEY TO THE JURY WAS NOT IMPROPER IF THE CIRCULARS WERE UNMAILABLE

The portion of the argument of the District Attorney to which petitioner now takes exception, appears at page 53 of the record, and reads as follows:

> I will say to you if you haven't decency enough after reading that letter and that card to say that this man ought to be stopped from sending those things to our girls then I am sorry for this community, and I hesitate to think what our sense of decency and right and wrong might be. I may be some-

> what of a Puritan; I know one thing full well, I believe in the purity of womanhood, and I will do all I can to protect them, and in so doing I am trying to urge upon you to do that, whatever you may have done that you ought not to have, what you may have not done that you ought to have done, will have no bearing on this case, for I know you are men enough, you have sense of decency enough and you are feeling the pulse of this community, which is to a sense of decency so that you will have no desire to see any girls in the future led wrong, led wrong I say simply because Dr. Dysart wants to make a business proposition out of fallen virtue, and wants to take the women, after they shall have fallen, out there and take care of them for dirty yellow gold.

If the circulars were obscene and unmailable this language, while not temperate, would not justify reversal.

CONCLUSION

This case is submitted to this Court upon the record and the opinion of the Circuit Court of Appeals, with the addition of some material which may aid the Court in reaching a conclusion. It is easy to understand that the good people of El Paso were outraged by the mailing of these circulars to respectable young women, and that the young women were indignant at the imputation they carried. Such considerations, coupled with the fact that the accused evidently did not stand well in the

community, would inevitably influence a verdict. It is not so easy to believe that circulars of this kind could to any substantial degree undermine morals or induce delinquency. To some such a result would seem altogether fanciful.

Many organizations maintaining maternity homes and hospitals for wayward young women anticipating motherhood out of wedlock, print and distribute descriptive matter not differing substantially from that disclosed here. The difference is that such matter is not directed to drumming up business, and the purpose back of it is social service and not, as in this case, "dirty yellow gold," as the United States Attorney said, but the question of mailability depends on the contents of the mailed matter and its effect on the persons receiving it, rather than the motive of the sender.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

O. R. LUHRING,
Assistant Attorney General.

HARRY S. RIDGELY,
Attorney.

NOVEMBER, 1926.

○

SUPREME COURT OF THE UNITED STATES.

No. 102.—October Term, 1926.

John Carlton Dysart, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 13, 1926.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Circuit Court of Appeals—4 Fed. (2d) 765—affirmed a judgment of conviction under an indictment which charged that petitioner deposited in the Post Office at El Paso, Texas, for conveyance through the mails, an obscene, lewd and lascivious printed card and letter, in violation of Section 211, Criminal Code. There were eleven counts, identical in all respects except that each named a different addressee, generally an unmarried woman.

Copies of the card and letter were set out *in haec verba*. They were intended to advertise The Queen Ann Private Home for unmarried women during pregnancy and confinement who prefer to be away from home during such time in order "to preserve individual character or family reputation." The letter, ostensibly intended for a doctor, states: The home is a private place for the care and protection of a few unfortunate women "until the time when they may return to their homes and friends, free from the burden of their mistake, to become useful members of society." "We find homes for infants by adoption when desired, or provide board for them at reasonable rates." Only persons recommended by reputable physicians are accepted. And it invites visits by physicians.

Section 211, Criminal Code, was taken from Section 3893, Revised Statutes. The pertinent portions follow: "Every obscene, lewd or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character . . . is hereby declared to be nonmailable matter . . . Whoever shall knowingly deposit or cause to be deposited for mailing or delivery anything declared by this section to be nonmailable

. . . shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

The Solicitor General, with his usual commendable candor, after calling attention to the facts disclosed by the record and relevant opinions, adds: "It is not so easy to believe that circulars of this kind could to any substantial degree undermine morals or induce delinquency. To some such a result would seem altogether fanciful."

In *Swearingen* v. *United States*, 161 U. S. 446, 450, where the indictment charged that the plaintiff in error mailed a newspaper containing an "obscene, lewd and lascivious article," contrary to Section 3893, Revised Statutes, this court said: "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words 'obscene,' 'lewd' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit. Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."

Notwithstanding the inexcusable action of petitioner in sending these advertisements to refined women, it is not possible for us to conclude that the indictment charges an offense within the meaning of the statute as construed by the opinion just cited. The motion to quash should have been sustained by the trial court.

The judgment below must be reversed and the cause remanded to the District Court, Western District of Texas, for further proceedings in harmony with this opinion.

A true copy.

Test:

Clerk, Supreme Court. U. S.